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No.

In the Supreme Court of the United States

OCTOBER TERM, 1988

FEDERAL LABOR RELATIONS AUTHORITY,
PETITIONER

v.

UNITED STATES DEPARTMENT OF AGRICULTURE, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED

Whether a procedure devised by the Eighth Circuit, allowing federal employees to direct their agency employer to withhold disclosure of their names and home addresses to the employees' exclusive representative when the representative requests such data under 5 U.S.C. 7114(b)(4) to facilitate direct communication between the representative and the employees, is contrary to that section because the procedure has no basis in law and in many cases defeats the rationale for the data disclosure requirement under Section 7114(b)(4).

PARTIES TO THE PROCEEDING

Petitioner, respondent/cross-petitioner below, is the Federal Labor Relations Authority. The respondents, petitioners/cross-respondents below, are the United States Department of Agriculture and Farmers Home Administration Finance Office, St. Louis, Missouri; and the United States Department of Defense and Defense Mapping Agency Aerospace Center, St. Louis, Missouri. The respondents, intervenors below, are the American Federation of Government Employees, AFL-CIO, Local 3354 and the National Federation of Federal Employees.

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UNITED STATES DEPARTMENT OF AGRICULTURE, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Federal Labor Relations Authority petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The judgment of the court of appeals (App. 19a-32a), affirming and enforcing in part and remanding in part two decisions and orders of the Authority, is reported at 836 F.2d 1139. The court's denial of the Authority's petition for rehearing and suggestion of rehearing *en banc* (App. 35a-37a) is unreported. The decisions and orders of the Federal Labor Relations Authority (App. 38a-55a, 81a-91a) are reported at 23 F.L.R.A. 788 and 24 F.L.R.A. 43.

JURISDICTION

The judgment of the court of appeals (App. 19a-32a) was entered on January 15, 1988. The Authority's timely petition for rehearing and suggestion of rehearing *en banc* was denied on March 29, 1988 (App. 35a-36a). The Eighth Circuit amended its March 29 order on April 1, 1988 (App. 37a). On June 21, 1988, Justice Blackmun extended the time within which to file a petition for a writ of certiorari to and including August 29, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

The relevant portions of the Federal Service Labor-Management Relations Statute, as amended, 5 U.S.C. 7101-7135 (1982 & Supp. IV 1986); the Freedom of Information Act, 5 U.S.C. 552 (1982 & Supp. IV 1986); and the Privacy Act, 5 U.S.C. 552a (1982 & Supp. IV 1986), are reproduced in the appendix (App. 1a-18a).

STATEMENT

1. The Federal Service Labor-Management Relations Statute ("the Statute") governs labor-management relations in the federal service.[1] Under the Statute, the responsibilities of the Federal Labor Relations Authority ("the Authority") including adjudicating unfair labor

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[1] The Statute was enacted as Section 701 of the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (1978). Prior to the enactment of the Statute, labor-management relations in the federal service were governed by a program established in 1962 by Executive Order No. 10988, 3 C.F.R. 521 (1959-1963 comp.). The Executive Order program was revised and continued by Exec. Order No. 11491, 3 C.F.R. 861 (1966-1970 comp.), as amended by Exec. Orders Nos. 11616, 11636, and 11838, 3 C.F.R. 605, 634, 957 (1971-1975 comp.).

practice complaints, negotiability disputes, bargaining unit and representation election matters, and resolving exceptions to arbitration awards. See 5 U.S.C. 7105(a)(1), (2); see also *Bureau of Alcohol, Tobacco and Firearms* v. *FLRA*, 464 U.S. 89, 93 (1983). The Authority may petition for enforcement of its orders in appropriate United States courts of appeals. 5 U.S.C. 7123(b). Persons, including federal agencies, who are aggrieved by certain types of Authority orders may seek judicial review in the courts of appeals. 5 U.S.C. 7123(a).

Congress specified in the Statute that "labor organizations and collective bargaining are in the public interest." 5 U.S.C. 7101(a). Consistent with this finding of Congress, the Statute requires an agency to accord exclusive recognition to a labor organization selected as the representative, in a secret ballot election, by a majority of the employees in an appropriate unit who cast valid ballots in the election. 5 U.S.C. 7111(a). A labor organization accorded such exclusive recognition has an obligation to represent fairly "all employees in the unit" regardless of whether they are union members. 5 U.S.C. 7114(a)(1). Employees in a unit of exclusive recognition have the right to refrain from joining a labor organization as a dues-paying member. 5 U.S.C. 7102. The agency and the labor organization have a duty to meet and negotiate in good faith for the purpose of arriving at a collective bargaining agreement. 5 U.S.C. 7114(a)(4). The duty to bargain in good faith extends to matters relating to conditions of employment affecting bargaining unit employees. 5 U.S.C. 7103(a)(12) and 7117.

A provision enacted by Congress in the Statute to facilitate union representation and enable unions to meet their representational duties is Section 7114(b)(4). That section requires a federal employer to furnish the exclusive bargaining representative "to the extent not prohibited by

law" with any requested data that is, among other things, "reasonably available"; "normally maintained by the agency in the regular course of business"; and "necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining." 5 U.S.C. 7114(b)(4).

The Statute also makes it an unfair labor practice for a federal agency employer to, among other things, "interfere with, restrain, or coerce any employee in the exercise by the employee of any right under [the Statute]"; "refuse to consult or negotiate in good faith with any labor organization"; or "otherwise fail or refuse to comply with any provision" of the Statute. 5 U.S.C. 7116(a)(1), (5), and (8).

2.a. This case involves two Authority decisions and orders arising from requests by exclusive representatives to federal employer agencies under 5 U.S.C. 7114(b)(4) for the names and home addresses of bargaining unit employees (App. 38a-55a, 81a-91a). In the first proceeding, the Authority's decision and order was issued on remand from the D.C. Circuit, as discussed at pages 4 to 10, below, as *Farmers Home Administration Finance Office, St. Louis, Missouri,* 23 F.L.R.A. 788 (1986) ("*FHAFO II*") (App. 38a-55a).

In *FHAFO II,* the American Federation of Government Employees Local 3354 ("AFGE" or "the union") by letter dated July 20, 1983, requested from the Farmers Home Administration Finance Office, St. Louis, Missouri ("Farmers Home Administration" or "the agency") a list of the names and home addresses of all bargaining unit employees (App. 65a). The union's local president indicated that AFGE wanted to use the information to communicate with all bargaining unit employees in the privacy of their homes concerning then-pending collective bargaining negotiations to renew the negotiated agreement covering the bargaining unit; and on subsequent occasions concerning

other matters (App. 65a-67a). The union was of the view that such communication would allow it to "frame intelligent collective bargaining proposals" in the pending negotiations (App. 66a). The local president also stated that he wanted employee names and home addresses to provide a private atmosphere for bargaining unit members to read and respond to union requests for opinions and information concerning matters of interest to the union and bargaining unit members (App. 66a). He indicated further that this data would also assist the union in recruiting new members (App. 66a). The agency denied the union's request in a letter dated August 18, 1983, on the ground that the disclosure of home addresses without employee consent would constitute a violation of the Privacy Act, 5 U.S.C. 552a (App. 66a).

b. Thereafter AFGE filed with the Authority's General Counsel an unfair labor practice (ULP) charge pursuant to 5 U.S.C. 7118(a) against the agency. The General Counsel issued a ULP complaint against the agency for its refusal to furnish the union with the names and home addresses of all unit employees (App. 63a-64a). The complaint was heard before an Authority Administrative Law Judge (ALJ), who found that the agency had not committed an unfair labor practice (App. 73a-80a). The ALJ found that the disclosure of the information was not required under Section 7114(b)(4) of the Statute in view of the alternative means available to the union to communicate with unit employees (App. 73a-80a). The ALJ therefore recommended that the complaint be dismissed (App. 80a).

After issuance of the ALJ's recommended decision, the Authority in its initial decision in this case (19 F.L.R.A. 195) (1985) ("*FHAFO I*") agreed with the conclusion of the ALJ that the agency had not committed ULPs under the Statute by refusing to provide AFGE with unit employee names and home addresses (App. 56a-62a). The Authority

based its conclusion, however, on the finding that the disclosure was "prohibited by law" under Section 7114(b)(4) of the Statute (App. 31a, 41a, 61a). The Authority held in this connection that disclosure of the information was prohibited by the Privacy Act, 5 U.S.C. 552a, which provides generally that federal agencies may not disclose data in records systems concerning individuals without their consent (App. 41a, 58a). The Authority noted (App. 41a-42a, 58a-59a) further in *FHAFO I* that disclosure under the Privacy Act of such data without an individual's consent is not barred if disclosure is required under the Freedom of Information Act (FOIA), 5 U.S.C. 552. 19 F.L.R.A. at 196-97. The Authority held (App. 39a, 42a, 60a-61a) that the FOIA does not require disclosure of employee names and home addresses because the data could be withheld under FOIA Exemption 6 concerning personal privacy, 5 U.S.C. 552(b)(6). The Authority did not determine whether another independent exception to the Privacy Act's nondisclosure requirement, 5 U.S.C. 552a(b)(3), allowing for unconsented disclosure if it would constitute a "routine use" of the data, was applicable (App. 39a, 56a-62a).

The union filed a petition for review of the Authority's decision in *FHAFO I* with the D.C. Circuit pursuant to 5 U.S.C. 7123(a) (App. 39a-40a). Before briefing, the Authority moved for and was granted a remand of the case, among other things in order to determine in the first instance whether unconsented disclosure to an exclusive representative of names and home addresses of unit employees was appropriate as a "routine use" for that data under the Privacy Act, 5 U.S.C. 552a(b)(3), and therefore not "prohibited by law" under Section 7114(b)(4) of the Statute (App. 39a-40a).[2]

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[2] In several other cases where unions had petitioned for review of Authority decisions which followed the precedent established in

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c. On remand, the Authority reversed its *FHAFO I* decision (App. 38a). The Authority determined that, under Section 7114(b)(4) of the Statute, names and home addresses must be disclosed to the union (App. 42a-51a). The Authority reached this conclusion after extensive public comment solicited by notice in the Federal Register (App. 40a-41a). The Authority indicated in *FHAFO II* that, under Section 7114(b)(4) of the Statute it must determine whether (1) disclosure of the names and home addresses of bargaining unit employees is prohibited by law; (2) the information is normally maintained by the agency in the regular course of business; (3) the union properly requested the information; and (4) the information is reasonably available and necessary within the meaning of Section 7114(b)(4) (App. 42a).

In considering whether disclosure of the data was prohibited by law pursuant to Section 7114(b)(4), the Authority noted the two relevant exceptions to the Privacy Act's bar to unconsented disclosure of information about individuals: exception (b)(2) of the Privacy Act, 5 U.S.C. 552a(b)(2), concerning disclosure required by the FOIA; and exception (b)(3), 5 U.S.C. 552a(b)(3), relating to disclosure which constitutes a "routine use" of information (App. 43a).

(Continued)

FHAFO I in other courts of appeals, the Authority also requested and obtained remands of the cases under review (App. 40a). The Second Circuit, however, denied the Authority's motion for remand and reversed the Authority's holding that the release of names and home addresses under Section 7114(b)(4) of the Statute was prohibited by the Privacy Act (App. 40a). *AFGE, Local 1760* v. *FLRA*, 786 F.2d 554 (2d Cir. 1986). The court found, among other things, that the minimal privacy interest in home addresses did not warrant their being withheld; and their release was not "prohibited by law" under Section 7114(b)(4) (App. 40a). 786 F.2d at 557.

The Authority, in considering the FOIA exception to the Privacy Act's general rule of nondisclosure, held that FOIA Exemption 6 would not bar disclosure under the FOIA (App. 45a). Therefore, disclosure of the data was not barred by the Privacy Act (App. 45a). Balancing pursuant to Exemption 6 the public interest served by release against employee privacy interests, the Authority found that the balance favors disclosure to the union of unit employee names and home addresses (App. 44a). The Authority stated that Congress in Section 7101 of the Statute found collective bargaining in the federal government to be in the public interest (App. 44a). Further, the Authority indicated that disclosure would contribute to the union's ability to communicate effectively with its bargaining unit employees, thereby enabling it better to fulfill its responsibilities under the Statute (App. 44a). The Authority also agreed (App. 44a) with the Second Circuit's conclusion in *AFGE, Local 1760* v. *FLRA,* 786 F.2d 554, 556 (2d Cir. 1986) that "the privacy interest of the average employee in his address is not particularly compelling." Additionally, the Authority indicated that employees may protect their individual privacy interests by discarding unsolicited mail from the union, and requesting that their names be deleted from the union's mailing list (App. 44a-45a). Further, the Authority held that agency employer withholding of employee names and home addresses could properly be based on a showing of "imminent danger" to an employee if that data were released (App. 50a-51a).

Turning to exception (b)(3) of the Privacy Act, the Authority held that the "routine use" exception to the Privacy Act's prohibition on unconsented release of data also eliminated that Act as a barrier to disclosure under Section 7114(b)(4) (App. 46a). The Authority noted (App. 45a) that the Office of Personnel Management (OPM) has

published a notice of routine use for federal employee personnel files which contain employee names and home addresses.[3] Among the routine uses included in the notice concerning employee personnel files was disclosure to union officials "when relevant and necessary to their duties of exclusive representation" (App. 45a). The Authority found this routine use to be essentially the same as the requirement under Section 7114(b)(4) of the Statute, that disclosure of data be "necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining" (App. 45a-46a). Because the Authority found that the "necessary" standard of Section 7114(b)(4) was met concerning employee names and home addresses, it also concluded that disclosure falls within the routine use established by OPM (App. 46a, 48a-51a). Thus, the Authority concluded that "even if the disclosure was not authorized under exception (b)(2) of the Privacy Act, relating to the FOIA, it is authorized under exception (b)(3)" (App. 46a).[4]

Accordingly, because the Authority found that the conditions for disclosure under Section 7114(b)(4) of the Statute were met, it held that the agency had committed unfair labor practices under Section 7116(a)(1), (5), and (8) of the Statute by refusing to provide employee names and home addresses to the union (App. 51a). The Authority also issued a remedial order directing the agency to, among other things, cease and desist from refusing to furnish that data to the union; and affirmatively to provide

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[3] The OPM routine use notice, 49 Fed. Reg. 36949, 39956 (Sept. 20, 1984), was a reissuance of the routine use notice published by OPM's predecessor, the Civil Service Commission. 40 Fed. Reg. 54356, 54362 (Nov. 21, 1975).

[4] The Authority also held under Section 7114(b)(4) that the data was reasonably available and normally maintained by the agency in the regular course of business (App. 46a, 48a).

the data to the union on request (App. 51a-52a). The Farmers Home Administration petitioned for review of this decision with the Eighth Circuit and the Authority sought enforcement of its order with that court (App. 21a).

3.a. In the second case reviewed by the court below, *Defense Mapping Agency Aerospace Center, St. Louis, Missouri,* 24 F.L.R.A. 43 (1986) ("*Defense Mapping II*") the course of events followed a similar sequence to that in *FHAFO II* (App. 81a-82a). The National Federation of Federal Employees, Local 1827 ("NFFE" or "the union") by letter dated July 23, 1982, requested a listing of bargaining unit employees' names and home addresses from the Defense Mapping Agency Aerospace Center, St. Louis, Missouri ("Defense Mapping Agency" or "the agency") (App. 82a, 102a). NFFE wanted the data to communicate quickly and confidentially to its unit employees information concerning upcoming negotiations on a secrecy agreement the agency wanted employees to sign; and advise employees prior to completion of negotiations on how to respond to agency demands that the agreement be signed (App. 104a). The agency refused to give the union the information because it claimed that the information was not maintained in a "reasonably available" form (App. 104a-105a).

b. Upon the filing of an unfair labor practice charge by the union, the General Counsel of the Authority issued a complaint against the Defense Mapping Agency for its refusal to provide the union, upon request, with employee names and home addresses (App. 99a). The complaint was heard before an ALJ who concluded that the union had no adequate means of communication with the employees it represented; that the Privacy Act was not a bar to such disclosure; and therefore the agency must supply the union with the requested information (App. 82a-83a, 114a-133a). As a result the ALJ found that the Defense Mapping Agency had committed unfair labor practices by

refusing to disclose employee names and home addresses (App. 133a). The Authority in its initial decision in this case, *Defense Mapping Agency Aerospace Center, St. Louis, Missouri,* 19 F.L.R.A. 675-78 (1985) ("*Defense Mapping I*") followed the precedent established in *FHAFO I* discussed at pages 5 to 6, *supra,* and reversed the ALJ (App. 83a, 92a-96a).

The union filed a petition for review of the Authority's *Defense Mapping I* decision with the Eighth Circuit (App. 83a). As in *FHAFO I,* the Authority prior to briefing sought and obtained a remand of the case to consider, among other things, the "routine use" question which it had not previously addressed (App. 40a, 81a). Following its decision on remand in *FHAFO II,* the Authority reversed its prior holding in *Defense Mapping I* (App. 82a). Thus, the Authority found the agency had committed unfair labor practices under Section 7116(a)(1), (5), and (8) of the Statute, and issued a remedial order similar to the one in *FHAFO II* (App. 85a-86a). The Defense Mapping Agency petitioned for review of this decision in the Eighth Circuit and the Authority sought enforcement of its order with that court (App. 21a).

4. On January 15, 1988, the Eighth Circuit affirmed and enforced in part and remanded in part the Authority orders in *FHAFO II* and *Defense Mapping Agency II,* which it had consolidated for review (App. 19a-29a). The court found that it was not arbitrary and capricious for the Authority to hold that names and home addresses are necessary data within the meaning of Section 7114(b)(4) of the Statute, because direct communication with employees at home effectively serves the bargaining process (App. 24a). The court also found that the disclosure of the employees' names and addresses was not "in general" prohibited by the FOIA (App. 25a, note 2).[5] The court held in

[5] Because the court held that the FOIA did not generally prohibit the disclosure, it did not consider whether the Privacy Act permits disclosure of the information as a "routine use" (App. 25a, note 2).

this connection that unit employees have a "cognizable privacy interest" in their home addresses (App. 27a). The court also deferred to the Authority's determination that "disclosure in general will help effect the policies" of the Statute in promoting the public interest through collective bargaining in the federal sector (App. 28a). The court below then concluded, however (Chief Judge Lay dissenting), that competing privacy and disclosure interests could "optimally" be served by allowing for disclosure only of the names and home addresses of unit employees who do not indicate to their employers that they do not want such data disclosed to their exclusive representatives (App. 29a). Accordingly, the court below remanded the cases to the Authority for amendment of its orders consistent with the court's decision (App. 29a).

Chief Judge Lay concurred in the judgment of the court below that the agency employers must disclose to the unions the names and home addresses of bargaining unit employees, but dissented from the holding "that employees may ask their *employers* to keep the information confidential" (App. 30a) (emphasis in original). Chief Judge Lay stated that this caveat had no basis in law; undermines the rationale for the principal holding of the court below; conflicts with decisions of the Second and Fourth Circuits; and fashions a remedy that was not requested or discussed by any party to the actions (App. 31a). Chief Judge Lay also indicated that the Statute contains no exception to the duty of disclosure which allowed individual employees to decide whether their names and home addresses will be disclosed (App. 31a). Further, Chief Judge Lay stated that the holding of the court below was inconsistent with the scheme of the FOIA, in that it called for the court to abdicate its responsibility by allowing individual employees to decide for themselves the applicability of FOIA Exemption 6 (App. 31a-32a).

Petitions for rehearing of the court's decision, with suggestions of rehearing *en banc,* filed by the Authority and the employer agencies were denied on March 29, 1988 (App. 35a-36a). The court amended its March 29 order on April 1, 1988 (App. 37a). A rehearing petition by intervenor AFGE in *FHAFO II* was earlier denied by the court, on February 24, 1988 (App. 33a-34a).

REASONS FOR GRANTING THE PETITION

The employee consent procedure devised by the court of appeals majority is unique among the decisions of the several courts of appeals having ruled that agency employers are required to disclose all unit employee names and home addresses under Section 7114(b)(4) of the Statute. The Seventh Circuit expressly declined to create a procedure allowing unit employees to determine whether their home addresses should be disclosed. *U.S. Dept. of the Air Force, Scott Air Force Base* v. *FLRA,* 838 F.2d 229, 233-34 (7th Cir. 1988). The Third Circuit in *Dept. of the Navy, Philadelphia Naval Shipyard* v. *FLRA,* 840 F.2d 1131, 1137 n.3 (3d Cir. 1988), declined to impose any requirement allowing individual employees to direct the withholding of their home addresses. That court observed that there was no record evidence showing that any employees wished to have that data withheld, and that the Authority's decision explicitly recognized that employees could direct the union to delete their names from a union mailing list. 840 F.2d at 1137 n.3. The Fourth Circuit enforced the Authority's orders in three consolidated cases under review there without creating an "opt out" approach as devised by the Eighth Circuit here. *U.S. Dept. of Health and Human Services, Social Security Admin.* v. *FLRA,* 833 F.2d 1129 (4th Cir. 1987).[6] Thus, the decision

[6] The Fourth, Seventh, and Third Circuits enforced in full Authority orders directing agency employers to provide exclusive representatives with the names and home addresses of the employees they repre-

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below departs from the consensus arrived at by the other circuit courts which have considered this issue.

Further, the majority decision of the court below concerning employee consent is also contrary to well-settled private sector labor law and FOIA principles, that unions and other data requesters are entitled to individuals' home addresses without imposition of the consent caveat created by the panel majority in the instant case. See, *e.g.*, *NLRB* v. *Wyman-Gordon Corp.*, 394 U.S. 759 (1969); *United Aircraft Corp.* v. *NLRB*, 434 F.2d 1198 (2d Cir. 1970), cert. denied, 401 U.S. 993 (1971); *Van Bourg, Allen, Weinberg & Roger* v. *NLRB*, 728 F.2d 1270 (9th Cir. 1984); *Getman* v. *NLRB*, 450 F.2d 670 (D.C. Cir. 1971); *Massillon Hospital Ass'n*, 282 N.L.R.B. No. 98 (Jan. 9, 1987); and *Georgetown Holiday Inn*, 235 N.L.R.B. 485 (1978).

Moreover, the panel majority's holding concerning employee consent will in many cases seriously impede the

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sent. *U.S. Dept. of Health and Human Services, Social Security Admin.* v. *FLRA*, 833 F.2d 1129 (4th Cir. 1987); *U.S. Dept. of the Air Force, Scott Air Force Base* v. *FLRA*, 838 F.2d 229 (7th Cir. 1988); *Dept. of the Navy, Philadelphia Naval Shipyard* v. *FLRA*, 840 F.2d 1131 (3d Cir. 1988). The D.C. Circuit has ordered a number of cases before it on this issue held in abeyance pending this Court's decision in *Dept. of Justice* v. *Reporters Committee for Freedom of the Press*, 56 U.S.L.W. 3718 (U.S. cert. granted Apr. 15, 1988) (No. 87-1379). *FLRA* v. *U.S. Dept. of the Treasury*, No. 87-1107, consolidated with Nos. 87-1108, 87-1115, 87-1121, 87-1129, and 87-1319 (D.C. Cir. order filed May 11, 1988).

Further, as indicated at pages 6-7, note 2, *supra*, the Second Circuit earlier reversed and remanded an Authority decision finding no unfair labor practice for an agency's refusal to provide unit employee names and home addresses. It did so without applying any employee option procedure like that devised by the Eighth Circuit in the instant case. *AFGE, Local 1760* v. *FLRA*, 786 F.2d 554 (2d Cir. 1986), reversing 19 F.L.R.A. 913 (1985).

flow of data Congress intended for exclusive representatives under Section 7114(b)(4) of the Statute, and for other data requesters under the FOIA. Finally, the lower court's majority ruling on employee consent is in error as wholly without support in law. For these reasons review by this Court is warranted.

1. The "opt out" procedure of the court below conflicts with the data disclosure provisions of Section 7114(b)(4) of the Statute because it gives individual unit employees, in cases involving data on individuals, the unfettered, subjective ability to control whether data will be disclosed to a union. The decision of the court below also creates similar problems in proper implementation of the FOIA.

a. Section 7114(b) of the Statute establishes certain requirements for satisfaction of the bargaining obligation between federal agency employers and exclusive representatives of agency employees. Congress expressly recognized in Section 7114(b)(4) the importance of providing unions with necessary data, when not otherwise barred by law, in order to facilitate the collective bargaining process. This process includes both negotiation of contracts, as well as their implementation through the negotiated grievance procedure. *U.S. Dept. of Health and Human Services, Social Security Admin.* v. *FLRA*, 833 F.2d 1129 (4th Cir. 1987); *AFGE* v. *FLRA*, 811 F.2d 769, 774-75 (2d Cir. 1987); *AFGE, Local 1345* v. *FLRA*, 793 F.2d 1360, 1363-64 (D.C. Cir. 1986); *AFGE, Local 1760* v. *FLRA*, 786 F.2d 554, 557 (2d Cir. 1986).[7] Further, data disclosure under

[7] It is also well-settled in private sector labor law that the duty of an employer to supply information is part and parcel of the fundamental duty to bargain. The duty to supply such information applies not only to information needed to negotiate an agreement, but also to data relevant to its administration. See, *e.g.*, *NLRB* v. *Acme Industrial Co.*, 385 U.S. 432, 435-36 (1967); *NLRB* v. *Truitt Manufacturing Co.*,

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Section 7114(b)(4) is instrumental in enabling a union to discharge its duty of fair representation imposed by Congress under Section 7114(a)(1) of the Statute. Section 7114(a)(1) states in relevant part that an exclusive representative is "responsible for representing the interests of all employees in the unit it represents without discrimination and without regard to labor organization membership." 5 U.S.C. 7114(a)(1).

However, by allowing individual employee interests to govern whether data disclosure takes place under Section 7114(b)(4), the decision of the court below disrupts the flow of information Congress intended under the Statute to enable a union to fulfill these representational rights and responsibilities. Under the majority decision all conditions for disclosure may be met under Section 7114(b)(4), but the flow of necessary data to the union may be substantially impeded or turned off altogether due to purely subjective individual employee desires. Any time a union requests data which involves an individual employee, the employee would have sole veto power over whether the data should be disclosed. Such a result means that the individual unit employee is given absolute power to regulate the flow of data without any regard to the important policies concerning operation of the collective bargaining process, as discussed at pages 15-16, *supra*.[8] This

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351 U.S. 149, 153 (1956). Unions cannot be expected to represent unit employees in an effective manner where they do not possess information which "is necessary to the proper discharge of the duties of the bargaining agent." *NLRB* v. *Whitin Machine Works*, 217 F.2d 593, 594 (4th Cir. 1954), cert. denied, 349 U.S. 905 (1955).

[8] In the instant case, the utility of disclosing employees' names and home addresses to unions obligated to represent employee interests, as a facilitator of the collective bargaining process, is patent. If a union is able to communicate effectively with its constituents by direct mailing, the union will be able to raise issues with management which are

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conclusion is contrary to Congress' policies and purposes in enacting Section 7114(b)(4), as Chief Judge Lay recognized in his dissent (App. 31a).

Moreover, it makes no sense to give employees veto power over whether a union can obtain their names and home addresses when the union properly can obtain, without employee consent, other data involving greater privacy interests. See, *e.g.*, *AFGE* v. *FLRA*, 811 F.2d 769 (2d Cir. 1987) (request concerning employees' official time and attendance records; progress reviews and performance appraisals; and various documents bearing on employees' work performance); *North Germany Area Council* v. *FLRA*, 805 F.2d 1044 (D.C. Cir. 1986) (request concerning disciplinary information); *NLRB* v. *Jaggars-Chiles-Stovall, Inc.*, 639 F.2d 1344 (5th Cir.) (request for wage data concerning employees), cert. denied, 454 U.S. 826 (1981). Thus, while disclosure of employees' names and home addresses may involve some level of privacy interest, it must be considered as relatively minor[9] when compared to disclosure of information involving wage rates, employee performance, or discipline. This incongruity created by the decision of the court below mitigates

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known to be of real concern to employees. The union will not have to waste the parties' time and resources by mistakenly pressing issues which are not of actual concern. Further, employees' organizational rights under Section 7102 are more effectively exercised when such a communication channel is established.

[9] *U.S. Dept. of the Air Force, Scott Air Force Base* v. *FLRA*, 838 F.2d at 232 ("[i]t is hard to see how the disclosure of home addresses could be 'clearly unwarranted' as a rule"); *AFGE, Local 1760* v. *FLRA*, 786 F.2d at 556 ("privacy interest of the average employee in his address is not particularly compelling"). See also *Getman* v. *NLRB*, 450 F.2d at 675 ("relatively minor" loss of privacy suffered by employees if their names and addresses were disclosed to labor law professor studying labor voting).

strongly against the decision standing.[10]

b. The decision of the court below, by erroneously allowing unit employees in many cases to regulate the flow of data from employer agency to exclusive representative, creates a related problem in implementation of the FOIA itself. Although the instant case arose directly under Section 7114(b)(4) of the Statute, the FOIA was considered as part of the analysis in assessing whether disclosure of the subject data is prohibited by law within the meaning of Section 7114(b)(4). The court below devised its employee consent procedure in the context of its analysis of FOIA Exemption 6 (App. 28a-29a). Further, the lower court relied in part on the legislative history of the FOIA itself in devising that procedure (App. 28a-29a). Accordingly, the decision of the court below gives every indication that it is equally applicable to cases arising directly under the FOIA. As such, the court's individual consent procedure will in many cases impair data disclosure under the FOIA in much the same way as it does under the Statute. That is, the individual consent procedure would put the individual who is the subject of the data in exclusive control over whether disclosure under the FOIA is to occur. This result is fundamentally at odds with congressional policy in enacting the FOIA, and further warrants review by this Court.

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[10] A potentially harmful side effect of the court's decision below for federal sector labor relations is the possibility of employer influence in assessing employee consent. Specifically, in order to carry out the scheme, employers may canvass unit employees to assess which ones want the union to have their name and home address withheld. This canvassing process would seem to be ripe for employer influence, real or imagined, as to whether an employee should consent to disclosure. It is precisely this kind of potential for employer interference in the union/employee communication process which led the Authority to conclude that alternative means of communication involving the workplace were irrelevant (App. 49a, 85a).

As this Court has said, disclosure, not secrecy, is the dominant objective of the FOIA. *Dept. of the Air Force* v. *Rose,* 425 U.S. 352, 361 (1976). Further, concerning an agency assertion of a FOIA exemption from that law's disclosure requirement, the FOIA "prescribes with unmistakable clarity *the role of the courts* in evaluating agency claims of exemption." *Sims* v. *Central Intelligence Agency,* 642 F.2d 562, 566 (D.C. Cir. 1980), aff'd in part and rev'd in part on other grounds, 471 U.S. 159 (1985) (emphasis provided). See also 5 U.S.C. 552(a)(4)(B) (an appropriate United States district court "has jurisdiction to enjoin [an] agency from withholding agency records and to order the production of any agency records improperly withheld"). Specially involving FOIA Exemption 6, it is the function of federal agencies in the first instance, and subsequently reviewing federal courts, to balance competing privacy interests and the public interest in deciding whether disclosure would constitute a "clearly unwarranted invasion of personal privacy." *Dept. of the Air Force* v. *Rose,* 425 U.S. at 379; 5 U.S.C. 552(a)(3), (4).

The court's decision below impairs administration of the FOIA pursuant to these well-established principles. As with Section 7114(b)(4) of the Statute (see pages 15 to 18, *supra*), the consent procedure devised by the court below would allow an individual to exercise exclusive control over whether disclosure will occur under the FOIA. There is no basis under this procedure for believing that individuals will be mindful of the FOIA's "dominant objective" of disclosure in deciding whether to consent to release. Rather, it is more likely that individuals will be mindful only of their own privacy interests. As a result, the emphasis in FOIA Exemption 6 disclosure cases involving personal privacy would, under the decision of the court below, shift towards withholding of data, contrary to Congress' intent in enacting that law.

Further, as Chief Judge Lay pointed out in his dissent (App. 31a-32a), the lower court's ruling improperly takes the responsibility for balancing competing interests in assessing whether disclosure should occur away from the entities charged by Congress with performing that function, *i.e.*, federal agencies and courts. By allowing individuals to have sole discretion over disclosure, the court below has effectively eliminated these institutions as the means to ensure objective, impartial operation of the FOIA in personal privacy cases.[11] The court below has substituted in their stead the individual, who is under no compunction whatsoever to engage in detached, balanced analysis of whether disclosure is called for.

In allowing individual consent to govern disclosure the decision below is also in error because it is without foundation in the FOIA itself. Congress set forth in the FOIA specific means for accommodating competing interests in deciding whether disclosure is required under that law. In its 1974 amendments to the FOIA Congress created a requirement that "any reasonably segregable portion of a record shall be provided to any person requesting such

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[11] The court below did not reach a conclusion as to whether employee privacy interests outweigh the public interest to such an extent that disclosure would be "clearly unwarranted" under FOIA Exemption 6. Rather, the court of appeals merely identified a "cognizable privacy interest" of employees in their home addresses (App. 27a); deferred to the Authority's determination that "disclosure in general will help effect the policies" of the Statute in promoting the public interest through collective bargaining in the federal sector (App. 28a); and concluded that these competing interests are "optimally served" by allowing employees to direct withholding (App. 29a). Thus, it cannot be said that the court below discharged its responsibility under the FOIA by concluding that disclosure of home addresses constitutes a "clearly unwarranted" invasion of privacy under Exemption 6, and merely substituted the employee consent procedure for outright withholding of the data.

record after deletion of the portions which are exempt" under subsection (b) of the FOIA. 5 U.S.C. 552(b).[12] Further, as indicated at page 19, *supra,* Congress stated in the FOIA that district courts may in FOIA cases "examine the contents of . . . agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions" set forth in subsection (b) of the law.

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[12] Prior to enactment of this segregability requirement in 1974, some courts had held in connection with certain FOIA exemptions that entire files may be withheld if some exempt material was contained in them. See, *e.g., Weisberg* v. *U.S. Dept. of Justice,* 489 F.2d 1195 (D.C. Cir. 1973) (*en banc*) (Exemption 7, 5 U.S.C. 552(b)(7), interpreted to allow withholding of entire investigatory files if they contain exempt materials, even if nonexempt records also are present), cert. denied, 416 U.S. 993 (1974). This practice was also followed by many federal agencies.

The Senate Report on the 1974 FOIA amendments stated as follows concerning the segregability requirement:

> [The requirement] emphasizes what is presently understood by most courts but has gone unheeded by agencies; it would not be enough for the government to refuse disclosure of the record merely because it or the file it was in contained such exempt information, since deletion of that information would provide full protection for the purposes to be served by the exemption. Thus, the government could not refuse to disclose the requested records merely because it finds in those records some portions which may be exempt.

S. Rep. No. 93-854, 93d Cong., 2d Sess. 32 (1974), *reprinted in* Subcomm. on Gov't. Information and Individual Rights of House Comm. on Gov't. Operations & Subcomm. on Administrative Practice and Procedure of Senate Comm. on the Judiciary, 94th Cong., 1st Sess., *Freedom of Information Act and Amendments of 1974, Source Book: Legislative History, Texts, and Other Documents,* at 184.

Segregability of employee names and home addresses is of course not feasible.

Consent of the individual is not one of the means adopted by Congress to effect the accommodation of competing interests concerning disclosure, even though it gave express consideration to means of accommodation. Accordingly, the lower court's ruling is fundamentally at odds with Congress' choice as to how competing interests concerning disclosure are to be resolved. Review by this Court is warranted for this reason as well. Cf. *National Railroad Passenger Corp.* v. *National Ass'n of Railroad Passengers,* 414 U.S. 453, 458 (1974) ("when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies").

2. In addition to the important issues of federal law discussed at pages 18 to 22, *supra,* review by this Court is also warranted because the court's "opt out" requirement is erroneous as wholly unsupported in law, as Chief Judge Lay correctly noted in his dissent (App. 31a). The majority opinion based its "opt out" requirement essentially on two points: first, it is consonant with Congress' providing unit employees with the right to choose the labor organization to represent them under Section 7101(a) of the Statute; and second, it is consistent with Congress' intent as expressed in the legislative history of the FOIA that competing interests in disclosure be balanced (App. 25a-28a). However, neither of these factors provides any support for the majority's conclusion and therefore the ruling is in error. Further, the lower court's majority holding is without basis in law and represents an improper interrelationship of the Privacy Act and FOIA.

a. Congress indicated in Section 7101(a)(1) that "the statutory protection of the right of employees to organize, bargain collectively, and participate through labor organizations of their own choosing in decisions which affect

them" benefits the public interest and promotes the amicable resolution of federal workplace disputes. 5 U.S.C. 7101(a)(1). Similar language contained in the National Labor Relations Act (NLRA), at section 7, 29 U.S.C. 157,[13] has been interpreted as aimed at ensuring a collective bargaining process free from the taint of employer domination or influence. See *Conair Corp.* v. *NLRB*, 721 F.2d 1355, 1381-83 (D.C. Cir. 1983); *NLRB* v. *Keller Ladders Southern, Inc.*, 405 F.2d 663, 667 (5th Cir. 1968).

Employee free choice in selecting a bargaining agent is not, however, a basis for concluding that employees, once a representative has been selected, can unilaterally govern the flow of data to the exclusive representative based on the employee's individual desires concerning disclosure. This result is contrary to Congress' intent that, once an exclusive representative is selected, it receive data necessary to carry out its rights and duties as exclusive representative, as discussed at pages 16-18, *supra.*

The panel majority below also erred by premising its employee option procedure in large part on a passage from the Senate Report on the original FOIA, enacted in 1966 (App. 28a). S. Rep. No. 89-813, 89th Cong., 1st Sess. 3 (1965), *reprinted in* Senate Subcomm. on Admin. Practice and Procedure, Comm. on the Judiciary, *Freedom of Information Act Source Book: Legislative Materials, Cases, Articles* (Committee Print 1974) at 38. This portion of the

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[13] Section 7 of the NLRA states in relevant part that "[e]mployees shall have the right to . . . bargain collectively through representatives of their own choosing." Section 7 has in no way affected well-settled private sector law that unions are entitled to employee home address lists for the asking, without imposition of the consent caveat created by the panel majority in the instant case. *United Aircraft Corp.* v. *NLRB*, 434 F.2d at 1198; *Georgetown Holiday Inn*, 235 N.L.R.B. at 486.

Senate Report alludes in general terms to the potential difficulties in balancing competing interests under the bill; the lack of need to abrogate one interest in furtherance of the competing interest; and development of a "workable formula" encompassing all interests while emphasizing "fullest responsible disclosure." At no point does this Senate Report identify individual consent as an appropriate means of accommodating competing interests, nor has this passage of the Senate Report ever been relied on previously to support such a conclusion. In any event, as discussed at pages 18 to 22, *supra,* individual consent is not even an appropriate means to accommodate competing interests in disclosure because it will tend to emphasize withholding, not release, of data, contrary to Congress' wishes.

b. The court below also erred in devising an employee option procedure because there is no legal authority to support it, either in private sector labor law or under the Privacy Act and the FOIA. Concerning private sector labor law, this Court has established that an employer may properly refuse to provide data to a union based on lack of employee consent to disclosure only when the data is highly sensitive in nature. *Detroit Edison Co.* v. *NLRB,* 440 U.S. 301 (1979) (employee aptitude test scores need not be disclosed by employer in absence of employee consent, due to sensitive nature of data). This narrow exception to the private sector general rule of disclosure of relevant data to unions, *NLRB* v. *Truitt Manufacturing Co.,* 351 U.S. at 149, has consistently been limited strictly to cases involving highly sensitive data.[14]

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[14] See, *e.g., WCCO Radio, Inc.* v. *NLRB,* 844 F.2d 511, 515 (8th Cir. 1988) (wage and personal contract data not sufficiently sensitive to be withheld from union based on desire for confidentiality by employees who are subjects of the data), petit. for cert. filed, 57 U.S.L.W. 3003 (U.S. No. 87-2021, June 10, 1988); *NLRB* v. *Pratt &*

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The data in the instant case, unit employee names and home addresses, does not approach the level of sensitivity that would warrant making employee consent a precondition of disclosure under *Detroit Edison*. Numerous federal courts have recognized only a minimal privacy interest in such data. *AFGE, Local 1760* v. *FLRA*, 786 F.2d 554 (2d Cir. 1986); *Van Bourg, Allen, Weinberg & Roger* v. *NLRB*, 728 F.2d 1270 (9th Cir. 1984); *Getman* v. *NLRB*, 450 F.2d 670 (D.C. Cir. 1971); *Prudential Insurance Co.* v. *NLRB*, 412 F.2d 77 (2d Cir.), cert. denied, 396 U.S. 928 (1969); *National Ass'n of Retired Federal Employees* v. *Horner*, 633 F. Supp. 1241 (D.D.C. 1986), appeal docketed, No. 86-5446 (D.C. Cir. argued Apr. 14, 1987).

The decision of the court below concerning employee consent is also in error because it misapprehends the proper role of individual consent in cases like the instant one, involving Privacy Act – FOIA interface. As indicated at pages 18 to 22, *supra*, disclosure of data in this case under Section 7114(b)(4) necessarily turns in part on whether disclosure is prohibited by the Privacy Act, 5 U.S.C. 552a. The nondisclosure provision of the Privacy Act, 5 U.S.C. 552a(b), prohibits *unconsented* disclosure by federal agencies of data concerning individuals unless

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Whitney Air Craft Division, 789 F.2d 121, 130 (2d Cir. 1986) (employee attitude survey not sufficiently sensitive to be withheld from union despite pledge to employee of confidentiality); *NLRB* v. *Jaggars-Chiles-Stovall, Inc.*, 639 F.2d at 1346-47 (non-union unit employees' request to employer not to disclose wage data concerning employees to union is not a valid basis for withholding, due to lack of sensitivity of the data); *The Detroit News, a Division of the Evening News Ass'n*, 270 N.L.R.B. 380, 381 (1984) (same). Compare *New Jersey Bell Telephone Co.* v. *NLRB*, 720 F.2d 789 (3d Cir. 1983) (employee leave records properly withheld, in absence of employee consent to release, where the records disclosed highly sensitive medical problems and treatment of employees).

one or more of several exceptions to the nondisclosure requirement are met. One such exception, relevant to this case, is whether disclosure of the data would be required under the FOIA. 5 U.S.C. 552a(b)(2).

The clear import of this nondisclosure provision in the Privacy Act is that an individual's consent to disclosure is sufficient in itself to warrant agency disclosure of data. However, *even in the absence of individual consent,* disclosure may occur under the Privacy Act if, among other things, release would be required under the FOIA. In short, the Privacy Act expressly contemplates that data release may occur without the subject's consent, if required under the FOIA. See *Andrews* v. *Veterans Admin.*, 838 F.2d 418, 422 (10th Cir. 1988) (without consent of data subjects, agency is prohibited from disclosing data unless disclosure required by FOIA), petit. for cert. filed, 56 U.S.L.W. 3769 (U.S. Apr. 26, 1988) (No. 87-1769). See also S. Rep. No. 93-1183, 93d Cong., 2d Sess. 71 (1974), *reprinted in* 1974 U.S. Code Cong. & Admin. News 6916, 6985 (initial Senate version of 5 U.S.C. 552a(b)(2) not intended to allow agencies to use FOIA "as an excuse to avoid their obligations under [the Privacy Act] to obtain informed consent" to disclosure from subjects of data). Rather, FOIA disclosure is to be assessed purely by weighing the competing interests involved, without consideration of individual consent. See, *e.g., Dept. of the Air Force* v. *Rose,* 425 U.S. at 379.

The lower court, by devising its employee consent requirement as a substitute for balancing competing factors under FOIA Exemption 6, has thus ruled contrary to Congress' intent as to how the Privacy Act and the FOIA should interact. Because the Privacy Act expressly contemplates data disclosure in the absence of individual consent, if required under the FOIA, the court below, by requiring individual consent in its FOIA analysis, has in-

verted the proper interaction between the FOIA and the Privacy Act. Congress instructed that the FOIA's disclosure rights be read into the Privacy Act, not that the Privacy Act's voluntary disclosure standard be read into the FOIA. The court's ruling below should be reviewed for this reason as well.[15]

Finally, the conflict the Eighth Circuit's decision produces with other circuit court opinions which have addressed similar issues is disruptive to the special need for uniformity in construing federal law which regulates federal sector labor-management relations. This Court has recognized that Congress, in regulating private sector labor management relations, intended that there be "uniform application" of statutory rules and procedures. *Garner* v. *Teamsters Local Union No. 776*, 346 U.S. 485, 490 (1953). In our view, this obtains with even greater force to federal sector labor-management relations, where bargaining units can be nationwide and the scope of the program is worldwide. The rights and obligations of the federal managers of an employer agency, and the unions who represent those employees, should not vary depending upon the circuit court of appeals in which their operations are conducted.

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[15] The court below also erred by not ruling on whether the "routine use" exception (5 U.S.C. 552a(b)(3)) to the Privacy Act's prohibition on unconsented disclosure is applicable. That exception is a wholly independent exception to the Privacy Act's general rule of nondisclosure. In this respect, even if release of the data in this case is not required under the FOIA or is found to be limited in some way, unconsented disclosure under the Privacy Act can still take place if the release constitutes a "routine use." The court below (App. 25a, note 2) declined to rule on the issue because it found the data generally available under the FOIA. However, it was error for the court below to fail to consider whether unconsented disclosure of all data requested was appropriate under the "routine use" exception. The cases should be remanded for this reason alone.

CONCLUSION

The petition for a writ of certiorari should be granted to review that portion of the lower court's decision concerning employees' consent to disclosure.[16]

Respectfully submitted.

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AUGUST 1988

[16] Charles Fried, Solicitor General on June 17, 1988, "authorize[d] the filing of this petition."

APPENDIX A

RELEVANT PORTIONS OF THE FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE, AS AMENDED, 5 U.S.C. §§ 7101-7135 (1982 & Supp. IV 1986); AND RELEVANT PORTIONS OF THE FREEDOM OF INFORMATION ACT, 5 U.S.C. 552; AND THE PRIVACY ACT, 5 U.S.C. 552a

5 U.S.C. 7101 provides:

§ 7101. Findings and purpose

"(a) The Congrss finds that –

"(1) experience in both private and public employment indicates that the statutory protection of the right of employees to organize, bargain collectively, and participate through labor organizations of their own choosing in decisions which affect them –

"(A) safeguards the public interest,

"(B) contributes to the effective conduct of public business, and

"(C) facilitates and encourages the amicable settlements of disputes between employees and their employers involving conditions of employment; and

"(2) the public interest demands the highest standards of employee performance and the continued development and implementation of modern and progressive work practices to facilitate and improve employee performance and the efficient accomplishment of the operations of the Government.

Therefore, labor organizations and collective bargaining in the civil service are in the public interest.

"(b) It is the purpose of this chapter to prescribe certain rights and obligations of the employees of the Federal Government and to establish procedures which are designed to meet the special requirements and needs of the

Government. The provisions of this chapter should be interpreted in a manner consistent with the requirements of an effective and efficient Government.

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5 U.S.C. 7102 provides:

"§ **7102. Employees' rights**

"Each employee shall have the right to form, join, or assist any labor organization, or to refrain from any such activity, freely and without fear of penalty or reprisal, and each employee shall be protected in the exercise of such right. Except as otherwise provided under this chapter, such right includes the right –

"(1) to act for a labor organization in the capacity of a representative and the right, in that capacity, to present the views of the labor organization to heads of agencies and other officials of the executive branch of the Government, the Congress, or other appropriate authorities, and

"(2) to engage in collective bargaining with respect to conditions of employment through representatives chosen by employees under this chapter.

* * * * *

5 U.S.C. 7103(a)(12) provides:

"§ **7103. Definitions: application**

"(a) For the purpose of this chapter –

"(12) 'collective bargaining' means the performance of the mutual obligation of the representative of an agency and the exclusive representative of employees in an appropriate unit in the agency to meet at reasonable times and to consult and bargain in a good-faith effort to reach agreement with respect to the conditions of employment affecting such

employees and to execute, if requested by either party, a written document incorporating any collective bargaining agreement reached, but the obligation referred to in this paragraph does not compel either party to agree to a proposal or to make a concession;

* * * * *

5 U.S.C. 7105(a) provides:

"§ **7105. Powers and duties of the Authority**

"(a)(1) The Authority shall provide leadership in establishing policies and guidance relating to matters under this chapter, and, except as otherwise provided, shall be responsible for carrying out the purpose of this chapter.

"(2) The Authority shall, to the extent provided in this chapter and in accordance with regulations prescribed by the Authority—

"(A) determine the appropriateness of units for labor organization representation under section 7112 of this title;

"(B) supervise or conduct elections to determine whether a labor organization has been selected as an exclusive representative by a majority of the employees in an appropriate unit and otherwise administer the provisions of section 7111 of this title relating to the according of exclusive recognition to labor organizations;

"(C) prescribe criteria and resolve issues relating to the granting of national consultation rights under section 7113 of this title;

"(D) prescribe criteria and resolve issues relating to determining compelling need for agency rules or regulations under section 7117(b) of this title;

"(E) resolve issues relating to the duty to bargain in good faith under section 7117(c) of this title;

"(F) prescribe criteria relating to the granting of consultation rights with respect to conditions of employment under section 7117(d) of this title;

"(G) conduct hearings and resolve complaints of unfair labor practices under section 7118 of this title;

"(H) resolve exceptions to arbitrator's awards under section 7122 of this title; and

"(I) take such other actions as are necessary and appropriate to effectively administer the provisions of this chapter.

* * * * *

5 U.S.C. 7111(a) provides:

"§ **7111, Exclusive recognition of labor organizations**

"(a) An agency shall accord exclusive recognition to a labor organization if the organization has been selected as the representative, in a secret ballot election, by a majority of the employees in an appropriate unit who cast valid ballots in the election.

* * * * *

5 U.S.C. 7114(a)-(b) provides:

"§ **7114. Representation rights and duties**

"(a)(1) A labor organization which has been accorded exclusive recognition is the exclusive representative of the employees in the unit it represents and is entitled to act for, and negotiate collective bargaining agreements covering, all employees in the unit. An exclusive representative is responsible for representing the interests of all employees in the unit it represents without discrimination and without regard to labor organization membership.

* * * * *

"(4) Any agency and any exclusive representative in any appropriate unit in the agency, through appropriate

representatives, shall meet and negotiate in good faith for the purposes of arriving at a collective bargaining agreement. In addition, the agency and the exclusive representative may determine appropriate techniques, consistent with the provisions of section 7119 of this title, to assist in any negotiation.

* * * * *

"(b) The duty of an agency and an exclusive representative to negotiate in good faith under subsection (a) of this section shall include the obligation—

"(4) in the case of an agency, to furnish to the exclusive representative involved, or its authorized representative, upon request and, to the extent not prohibited by law, data—

"(A) which is normally maintained by the agency in the regular course of business;

"(B) which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining; and

"(C) which does not constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining; and

* * * * *

5 U.S.C. 7116(a) provides:

"§ **7116. Unfair labor practices**

"(a) For the purpose of this chapter, it shall be an unfair labor practice for an agency—

"(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;

* * * * *

"(5) to refuse to consult or negotiate in good faith with a labor organization as required by this chapter;

* * * * *

"(8) to otherwise fail or refuse to comply with any provision of this chapter.

* * * * *

5 U.S.C. 7117 provides:

"§ 7117. Duty to bargain in good faith; compelling need; duty to consult

"(a)(1) Subject to paragraph (2) of this subsection, the duty to bargain in good faith shall, to the extent not inconsistent with any Federal law or any Goverment-wide rule or regulation, extend to matters which are the subject of any rule or regulation only if the rule or regulation is not a Government-wide rule or regulation.

"(2) The duty to bargain in good faith shall, to the extent not inconsistent with Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any agency rule or regulation referred to in paragraph (3) of this subsection only if the Authority has determined under subsection (b) of this section that no compelling need (as determined under regulations prescribed by the Authority) exists for the rule or regulation.

"(3) Paragraph (2) of the subsection applies to any rule or regulation issued by any agency or issued by any primary national subdivision of such agency, unless an exclusive representative represents an appropriate unit including not less than a majority of the employees in the issuing agency or primary national subdivision, as the case may be, to whom the rule or regulation is applicable.

"(b)(1) In any case of collective bargaining in which an exclusive representative alleges that no compelling need

exists for any rule or regulation referred to in subsection (a)(3) of this section which is then in effect and which governs any matter at issue in such collective bargaining, the Authority shall determine under paragraph (2) of this subsection, in accordance with regulations prescribed by the Authority, whether such a compelling need exists.

"(2) For the purpose of this section, a compelling need shall be determined not to exist for any rule or regulation only if—

"(A) the agency, or primary national subdivision, as the case may be, which issued the rule or regulation informs the Authority in writing that a compelling need for the rule or regulation does not exist; or

"(B) the Authority determines that a compelling need for a rule or regulation does not exist.

"(3) A hearing may be held, in the discretion of the Authority, before a determination is made under this subsection. If a hearing is held, it shall be expedited to the extent practicable and shall not include the General Counsel as a party.

"(4) The agency, or primary national subdivision, as the case may be, which issued the rule or regulation shall be a necessary party at any hearing under this subsection.

"(c)(1) Except in any case to which subsection (b) of this section applies, if an agency involved in collective bargaining with an exclusive representative alleges that the duty to bargain in good faith does not extend to any matter, the exclusive representative may appeal the allegation to the Authority in accordance with the provisions of this subsection.

"(2) The exclusive representative may, on or before the 15th day after the date on which the agency first makes the allegation referred to in paragraph (1) of this subsection, institute an appeal under this subsection by—

"(A) filing a petition with the Authority; and

"(B) furnishing a copy of the petition to the head of the agency.

"(3) On or before the 30th day after the date of the receipt by the head of the agency of the copy of the petition under paragraph (2)(B) of this subsection, the agency shall—

"(A) file with the Authority a statement—

"(i) withdrawing the allegation; or

"(ii) setting forth in full its reasons supporting the allegation; and

"(B) furnish a copy of such statement to the exclusive representative.

"(4) On or before the 15th day after the date of the receipt by the exclusive representative of a copy of a statement under paragraph (3)(B) of this subsection, the exclusive representative shall file with the Authority its response to the statement.

"(5) A hearing may be held, in the discretion of the Authority, before a determination is made under this subsection. If a hearing is held, it shall not include the General Counsel as a party.

"(6) The Authority shall expedite proceedings under this subsection to the extent practicable and shall issue to the exclusive representative and to the agency a written decision on the allegation and specific reasons therefor at the earliest practicable date.

"(d)(1) A labor organization which is the exclusive representative of a substantial number of employees, determined in accordance with criteria prescribed by the Authority, shall be granted consultation rights by any agency with respect to any Government-wide rule or regulation issued by the agency effecting any substantive change in any condition of employment. Such consulta-

tion rights shall terminate when the labor organization no longer meets the criteria prescribed by the Authority. Any issue relating to a labor organization's eligibility for, or continuation of, such consultation rights shall be subject to determination by the Authority.

"(2) A labor organization having consultation rights under paragraph (1) of this subsection shall—

"(A) be informed of any substantive change in conditions of employment proposed by the agency, and

"(B) shall be permitted reasonable time to present its views and recommendations regarding the changes.

"(3) If any views or recommendations are presented under paragraph (2) of this subsection to an agency by any labor organzation—

"(A) the agency shall consider the views or recommendations before taking final action on any matter with respect to which the views or recommendations are presented; and

"(B) the agency shall provide the labor organization a written statement of the reasons for taking the final action.

* * * * *

5 U.S.C. 7118(a) provides:

"§ **7118. Prevention of unfair labor practices**

"(a)(1) If any agency or labor organization is charged by any person with having engaged in or engaging in an unfair labor practice, the General Counsel shall investigate the charge and may issue and cause to be served upon the agency or labor organization a complaint. In any case in which the General Counsel does not issue a complaint because the charge fails to state an unfair labor practice, the General Counsel shall provide the person making the charge a written statement of the reasons for not issuing a complaint.

"(2) Any complaint under paragraph (1) of this subsection shall contain a notice—

"(A) of the charge;

"(B) that a hearing will be held before the Authority (or any member thereof or before an individual employed by the authority and designated for such purpose); and

"(C) of the time and place fixed for the hearing.

"(3) The labor organization or agency involved shall have the right to file an answer to the original and any amended complaint and to appear in person or otherwise and give testimony at the time and place fixed in the complaint for the hearing.

"(4)(A) Except as provided in subparagraph (B) of this paragraph, no complaint shall be issued based on any alleged unfair labor practice which occurred more than 6 months before the filing of the charge with the Authority.

"(B) If the General Counsel determines that the person filing any charge was prevented from filing the charge during the 6-month period referred to in subparagraph (A) of this paragraph by reason of—

"(i) any failure of the agency or labor organization against which the charge is made to perform a duty owed to the person, or

"(ii) any concealment which prevented discovery of the alleged unfair labor practice during the 6-month period,

the General Counsel may issue a complaint based on the charge if the charge was filed during the 6-month period beginning on the day of the discovery by the person of the alleged unfair labor practice.

"(5) The General Counsel may prescribe regulations providing for informal methods by which the alleged unfair labor practice may be resolved prior to the issuance of a complaint.

"(6) The Authority (or any member thereof or any individual employed by the Authority and designated for such purpose) shall conduct a hearing on the complaint not earlier than 5 days after the date on which the complaint is served. In the discretion of the individual or individuals conducting the hearing, any person involved may be allowed to intervene in the hearing and to present testimony. Any such hearing shall, to the extent practicable, be conducted in accordance with the provisions of subchapter II of chapter 5 of this title, except that the parties shall not be bound by rules of evidence, whether statutory, common law, or adopted by a court. A transcript shall be kept of the hearing. After such a hearing the Authority, in its discretion, may upon notice receive further evidence or hear argument.

"(7) If the Authority (or any member thereof or any individual employed by the Authority and designated for such purpose) determines after any hearing on a complaint under paragraph (5) of this subsection that the preponderance of the evidence received demonstrates that the agency or labor organization named in the complaint has engaged in or is engaging in an unfair labor practice, then the individual or individuals conducting the hearing shall state in writing their findings of fact and shall issue and cause to be served on the agency or labor organization an order—

"(A) to cease and desist from any such unfair labor practice in which the agency or labor organization is engaged;

"(B) requiring the parties to renegotiate a collective bargaining agreement in accordance with the order of the Authority and requiring that the agreement, as amended, be given retroactive effect;

"(C) requiring reinstatement of an employee with backpay in accordance with section 5596 of this title; or

"(D) including any combination of the actions described in subparagraphs (A) through (C) of this paragraph or such other action as will carry out the purpose of this chapter.

If any such order requires reinstatement of an employee with backpay, backpay may be required of the agency (as provided in section 5596 of this title) or of the labor organization, as the case may be, which is found to have engaged in the unfair labor practice involved.

"(8) If the individual or individuals conducting the hearing determine that the preponderance of the evidence received fails to demonstrate that the agency or labor organization named in the complaint has engaged in or is engaging in an unfair labor practice, the individual or individuals shall state in writing their findings of fact and shall issue an order dismissing the complaint.

* * * * *

5 U.S.C. 7123(a)-(b) provides:

"§ **7123. Judicial review; enforcement**

"(a) Any person aggrieved by any final order of the Authority other than an order under—

"(1) section 7122 of this title (involving an award by an arbitrator), unless the order involves an unfair labor practice under section 7118 of this title, or

"(2) section 7112 of this title (involving an appropriate unit determination),

may, during the 60-day period beginning on the date on which the order was issued, institute an action for judicial review of the Authority's order in the United States court of appeals in the circuit in which the person resides or

transacts business or in the United States Court of Appeals for the District of Columbia.

"(b) The Authority may petition any appropriate United States court of appeals for the enforcement of any order of the Authority and for appropriate temporary relief or restraining order.

* * * * *

5 U.S.C. 552(a)-(b) provides:

§ 552. Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

* * * * *

(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

(4)(A)(i) In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying the schedule of fees applicable to the processing of requests under this section and establishing procedures and guidelines for determining when such fees should be waived or reduced. Such schedule shall conform to the guidelines which shall be promulgated, pursuant to notice and receipt of public comment, by the Director of the Office of Management and Budget and which shall provide for a uniform schedule of fees for all agencies.

(ii) Such agency regulations shall provide that –

(I) fees shall be limited to reasonable standard charges for document search, duplication, and review, when records are requested for commercial use;

(II) fees shall be limited to reasonable standard charges for document duplication when records are not sought for commercial use and the request is made by an educational or noncommercial scientific institution, whose purpose is scholarly or scientific research; or a representative of the news media; and

(III) for any request not described in (I) or (II), fees shall be limited to reasonable standard charges for document search and duplication.

(iii) Documents shall be furnished without any charge or at a charge reduced below the fees established under clause (ii) if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.

(iv) Fee schedules shall provide for the recovery of only the direct costs of search, duplication, or review. Review costs shall include only the direct costs incurred during the initial examination of a document for the purposes of determining whether the documents must be disclosed under this section and for the purposes of withholding any portions exempt from disclosure under this section. Review costs may not include any costs incurred in resolving issues of law or policy that may be raised in the course of processing a request under this section. No fee may be charged by any agency under this section—

(I) if the costs of routine collection and processing of the fee are likely to equal or exceed the amount of the fee; or

(II) for any request described in clause (ii)(II) or (III) of this subparagraph for the first two hours of search time or for the first one hundred pages of duplication.

(v) No agency may require advance payment of any fee unless the requester has previously failed to pay fees in a timely fashion, or the agency has determined that the fee will exceed $250.

(vi) Nothing in this subparagraph shall supersede fees chargeable under a statute specifically providing for setting the level of fees for particular types of records.

(vii) In any action by a requester regarding the waiver of fees under this section, the court shall determine the matter de novo: *Provided,* That the court's review of the matter shall be limited to the record before the agency.

* * * * *

(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.

(C) Notwithstanding any other provision of law, the defendant shall serve an answer or otherwise plead to any complaint made under this subsection within thirty days after service upon the defendant of the pleading in which such complaint is made, unless the court otherwise directs for good cause shown.

[(D) Repealed. Pub.L. 98-620, Title IV, § 402(2), Nov. 8, 1984, 98 Stat. 3357]

(E) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complaint has substantially prevailed.

(F) Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding, the Special Counsel shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding. The Special Counsel, after investigation and consideration of the evidence submitted, shall submit his findings and recommendations to the administrative authority of the agency concerned and shall send copies of the findings and recommendations to the officer or employee or his representative. The administrative authority shall take the corrective action that the Special Counsel recommends.

(G) In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member.

* * * * *

(b) This section does not apply to matters that are—

(1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investiga-

tions or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

Any reasonable segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.

* * * * *

§ 552a. Records maintained on individuals

* * * * *

(b) Conditions of disclosure.—No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be—

* * * * *

(2) required under section 552 of this title;

(3) for a routine use as defined in subsection (a)(7) of this section and described under subsection (e)(4)(D) of this section;

* * * * *

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 86-2579

THE UNITED STATES DEPARTMENT OF AGRICULTURE AND THE FARMERS HOME ADMINISTRATION FINANCE OFFICE, ST. LOUIS, MISSOURI,

PETITIONERS,

v.

FEDERAL LABOR RELATIONS AUTHORITY,

RESPONDENT.

No. 87-1024

THE UNITED STATES DEPARTMENT OF DEFENSE AND DEFENSE MAPPING AGENCY AEROSPACE CENTER, ST. LOUIS, MISSOURI,

PETITIONERS,

v.

FEDERAL LABOR RELATIONS AUTHORITY,

RESPONDENT.

NATIONAL FEDERATION OF FEDERAL EMPLOYEES,

INTERVENOR.

Submitted: September 1, 1987

Filed: January 15, 1988

PETITIONS FOR REVIEW OF THE FEDERAL LABOR RELATIONS AUTHORITY

Before LAY, Chief Judge, HENLEY, Senior Circuit Judge, and MAGILL, Circuit Judge.

HENLEY, Senior Circuit Judge.

These cases present the question whether federal agencies committed an unfair labor practice by refusing to release to labor unions the names and addresses of bargaining unit employees. The agencies challenge rulings by the Federal Labor Relations Authority requiring disclosure of the names and addresses. We affirm the Authority's decisions, subject to one reservation.

The president of the American Federation of Government Employees, Local 3354, requested in a letter to the Director of the Farmers Home Administration Finance Office (FmHA) a list of the names and home addresses of approximately 903 employees, the majority of whom were not union members. The union asserted a need for the names and addresses for purposes of bargaining, dealing with unspecified problems, and conducting membership drives. FmHA refused to disclose the information, claiming that, under the provisions of the Privacy Act, 5 U.S.C. § 552a(b), the information could not be disclosed without the employees' consent.

The president of Local 3354 then filed with the Authority an unfair labor practice charge against the FmHA. In turn, the Authority's General Counsel filed a complaint against the FmHA. The administrative law judge ruled that the names and addresses were not subject to disclosure, as they were not "necessary for a full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining" under 5 U.S.C. § 7114(b) of the Federal Labor Management Relations Act (FLMRA). The judge did not pass upon the agency's claim that disclosure would violate the Privacy Act.

The Authority affirmed the Administrative Law Judge's decision. The Authority also concluded that federal employees' privacy interests in their home addresses

outweighed the union's need for the information. The union filed a petition for review with the District of Columbia Circuit pursuant to 5 U.S.C. § 7123(a). Before briefing was completed, the Authority moved for and was granted a remand in order to determine whether the "routine use" exception to the Privacy Act applied. 5 U.S.C. § 552a(b)(3).

On remand the Authority reversed its previous decision and determined that the names and home addresses must be disclosed to the union. The Authority found that the requested information qualified for the "routine use" exception, and reversed its position on the Privacy Act question. The Authority also found that the information was "necessary" for collective bargaining under 5 U.S.C. § 7114(b). FmHA petitions this court for review pursuant to 5 U.S.C. § 7123(a); the Authority cross-petitions for enforcement of its orders. § 7123(b).

The National Federation of Federal Employees requested the names and home addresses of bargaining unit employees of the Defense Mapping Agency Aerospace Center at St. Louis. A course of events similar to that described in the FMHA case transpired. Although the Administrative Law Judge found that the union had no adequate alternative means of communication, the Authority reversed that factual finding and determined that adequate alternatives existed. Relying on its reasoning in the initial FmHA decision, the Authority further concluded that "the employees' strong privacy interest in their home addresses" outweighed the union's need for the information.

The union petitioned this court for review. As in the FmHA case, the Authority moved for a remand, which we granted, to consider the "routine use" question. Following its decison on remand in the FmHA case, the Authority reversed its prior position in the Defense Mapping case as well. Again, the Agency petitions for review, the Authority for enforcement.

The standards for our review of the Authority's decisions were set forth in *United States Department of Agriculture v. FLRA*, 691 F.2d 1242, 1246-47 (8th Cir. 1982), *cert. denied*, 464 U.S. 1007 (1983). To summarize, we will set aside the Authority's action only if we find it "arbitrary, capricious, or an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). We may not reject a reasonably defensible construction of the statute by the agency merely because we would have decided differently; we owe deference to the Authority's interpretation of its enabling statute if it has a "reasonable basis in law." *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 131 (1944); *see USDA*, 691 F.2d at 1247. Nevertheless, statutory questions find their final resolution in the courts, whose duty it is to conform administrative decisions to the congressional mandate. *USDA*, 691 F.2d at 1247.

5 U.S.C. § 7114(b) provides:

> The duty of an agency and an exclusive representative to negotiate in good faith . . . shall include the obligation—
>
> . . . . .
>
> (4) in the case of an agency, to furnish to the exclusive representative involved, . . . upon request and, to the extent not prohibited by law, data—
>
> . . . . .
>
> (B) which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining. . . .

Thus, we must determine whether the names and addresses sought by the unions are data that are necessary to the collective bargaining process. "Collective bargaining" is defined as the process by which the parties attempt to

reach agreement over "conditions of employment affecting [the] employees. . . . " 5 U.S.C. § 7103(a)(12).

The appellant agencies argue that the Authority erred in concluding that the requirements of 5 U.S.C. § 7114(b) were satisfied. The agencies contend that the home addresses are not "data" subject to disclosure, as they do not concern "conditions of employment." The Authority reasoned that disclosure was necessary as it would allow the union to communicate directly with employees at home without interference from the agency. Furthermore, disclosure would enable employees to peruse union communications free of any constraints of time or management presence that might occur in the workplace. The agencies argue that these facts affect only the quality of the relationship between the union and bargaining unit members, and are not related to the process of contract negotiation.

The argument of the agencies has merit with respect to some of the unions' stated goals in seeking to obtain the addresses. For example, the use of the lists for the purpose of soliciting new members is only tenuously related to the process of contract negotiation as defined in the statute. However, the unions also seek the information for the purpose of soliciting employees' views and keeping them informed on collective bargaining matters. The intervenor unions correctly point out that they are statutorily obligated to represent the interests of all members of the bargaining unit, regardless of union membership. 5 U.S.C. § 7114(a)(1). The Authority has determined that, in order for a union to properly represent the employees, it must be able to communicate with them. We agree. Thus, § 7114(a)(1) provides a statutory basis entitling the union to some effective means of communication with unit employees.

Consequently, the issue is not whether the addresses are "data" relevant to collective bargaining; rather, we must decide the question whether to uphold the Authority's determination that disclosure to the union is necessary to fair and effective bargaining and representation. § 7114(b). The agencies argue that the Authority's reversal of its prior stance is unexplained, and hence, arbitrary and capricious. We would agree that the Authority has done little in the way of providing factual findings to justify its present position. Nevertheless, the Authority reached that position after extensive public comment solicited by notice in the Federal Register. The Authority concluded, as we have noted, that direct communication with employees at home without the possibility of interference by management will best serve the purposes underlying the labor statute. We cannot say that the Authority's position is irrational; consequently, we do not find it arbitrary or capricious. To that extent, we are in accord with the recent decision by the Fourth Circuit in *United States Department of Health & Human Services v. FLRA*, No. 87-3513(L), slip op. at 12 (4th Cir. Nov. 25, 1987). We likewise concur in the Fourth Circuit's caveat that disclosure is not required when it would present an imminent danger to employees. *Id.*

However, Section 7114(b)(4) authorizes disclosure of data only when not otherwise prohibited by law. The agencies direct our attention to the Privacy Act, 5 U.S.C. § 552a, which prohibits disclosure of information from federal workers' personnel files without their consent unless required by one of the Act's exemptions. One exemption provides for disclosures required by the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b).[1] FOIA in

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[1] Thus, we are faced with the obverse of the question recently presented to the Supreme Court in *Church of Scientology of Cali-*

turn contains its own exemptions, one of which prohibits disclosure of information in government records "which would constitute a clearly unwarranted invasion of personal privacy." § 552(b)(6) ("exemption 6").[2]

We must be guided by the principle that the "limited exemptions [of FOIA] . . . do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act. These exemptions . . . must be narrowly construed." *Department of the Air Force v. Rose*, 425 U.S. 352, 361 (1976) (internal quotation and citation omitted). In evaluating a claim that exemption 6 bars disclosure, we are required to balance the interest of an individual in the protection of private matters with the public's interest in access to information in the hands of the government. *Id.* at 372.

First, we should determine the extent, if any, to which individuals possess a privacy interest in their home addresses. The Supreme Court has recognized a right to privacy embracing the right "to be let alone" which "must be placed in the scales with the right of others to communicate." *Rowan v. Post Office Department*, 397 U.S. 728, 736 (1970). Thus, "a mailer's right to communicate must stop at the mailbox of an unreceptive addressee." *Id.* at 736-37. "The ancient concept that [the home is one's castle] into which 'not even the king may enter' has lost none of its vitality." *Id.* at 737.

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fornia v. I.R.S., 108 S.Ct. 271 (1987), *i.e.*, whether disclosure under FOIA was specifically affected by another statute. 5 U.S.C. § 552(b)(3); 108 S.Ct. at 273.

[2] In addition to the FOIA exemption 6, the Privacy Act permits disclosure of information for a "routine use." 5 U.S.C. § 552a(b)(3). Because we hold that FOIA in general does not prohibit disclosure, we need not consider the Authority's contention that the routine use exception permits disclosure.

These pronouncements have led courts to conclude that individuals do have a privacy interest in their home addresses that may be asserted in opposition to requests for disclosure under FOIA. *Multnomah Co. Medical Society v. Scott*, 825 F.2d 1410, 1415-16 (9th Cir. 1987); *Heights Community Congress v. Veterans Administration*, 732 F.2d 526, 529 (6th Cir.), *cert. denied*, 469 U.S. 1034 (1984); *United States v. Liebert*, 519 F.2d 542, 548 (3d Cir.), *cert. denied*, 423 U.S. 985 (1975); *Wine Hobby USA, Inc. v. Internal Revenue Service*, 502 F.2d 133, 137 (3d Cir. 1974).

In a case brought directly under FOIA, the Fourth Circuit has upheld a federal agency's refusal to release employee addresses to the union on the basis that disclosure would constitute a clearly unwarranted invasion of personal privacy. *AFGE, Local 1923 v. United States Department of Health and Human Services*, 712 F.2d 931, 932 (4th Cir. 1983) (per curiam). Subsequently, however, the Fourth Circuit declined to apply its holding in *AFGE, Local 1923* when the Authority has upheld disclosure pursuant to § 7114(b). *Department of Health & Human Services*, slip op. at 17-18. The court deferred to the Authority's rulings because, "[a]lthough this matter involves the Authority's interpretation of statutes other than its enabling act, we perceive that the interpretation bears directly on the 'complexities' of federal labor relations. . . ." *Id.* at 17-18.

The Second Circuit examined the privacy argument in *AFGE, Local 1760 v. FLRA*, 786 F.2d 554 (2d Cir. 1986), and concluded that release of the employees' addresses was not "prohibited by law" as provided in § 7114(b)(4). The court reasoned that "the privacy interest of the average employee in his address is not particularly compelling. Generally, addresses are often available through other

public records." *Id.* at 556; *see also AFGE, Local 1923,* 712 F.2d at 934 (Winter, C.J., dissenting).

Nonetheless, the Second Circuit's holding acknowledged that disclosure implicated a "modest" privacy interest. *AFGE, Local 1760,* 786 F.2d at 556-57. We cannot agree that even such a modest interest should receive little solicitude solely because the information at stake may be available from other sources. "That society recognizes the individual's interest in keeping his address private is indicated in such practices as non-listing of telephone numbers and the renting of post office boxes." *Wine Hobby,* 502 F.2d at 137 n.15. Furthermore, while we might not violently disagree with the Second Circuit's statement that the average employee's privacy interest in his home address is not particularly compelling, not all employees are "average." Some may well have more compelling interests in privacy which are entitled to protection. Thus, we conclude that employees have a cognizable privacy interest in their home addresses.

We next must weight the privacy interest of the employees against the interests of the public in disclosure.[3] Congress has declared that collective bargaining is in the public interest. 5 U.S.C. § 7101(a). The statue reveals that two bases support that declaration. The first is that the

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[3] One circuit has recently held in a divided panel opinion that the courts should not evaluate the strength of the public interest asserted, but should only "appraise the impairment to [the privacy] interest that would result from disclosure." *Reporters Committee for Freedom of the Press v. United States Department of Justice,* 831 F.2d 1124, 1126 (D.C. Cir. 1987). At least in part, the majority reached this conclusion because it could find no guidance or standards in the FOIA to inform an evaluation of the general public interest in individual cases. Our own difficulty in that respect is somewhat mitigated by 5 U.S.C. § 7101(a), which defines the public interest as hereinafter discussed in text.

public interest is served by protecting "the right of employees to organize, bargain collectively, and participate through labor organizations *of their own choosing* in decisions which affect them. . . ." § 7101(a)(1) (emphasis added). The second is the promotion of governmental efficiency. § 7101(a)(2). We will defer to the Authority's expertise insofar as it has determined that disclosure in general will help effect the policies embodied in the FLMRA. However, we cannot ignore the element of choice on the part of employees in choosing their representatives set out in § 7101(a). We doubt that the public interest would be served in any way by imposing disclosure of the names and addresses on employees who regard that information as private and who do not choose to receive union communications at home.

The Authority addresses this issue in its contention that individual employees who do not wish to have their names and addresses disclosed may have their names removed from the union mailing list. The agencies counter that the law provides for no such procedure. We find, however, that FOIA is flexible enough to accommodate a solution to this difficulty. We have identified substantial interests on both the disclosure and privacy sides of the ledger. FOIA's legislative history sheds some light on the problem:

> It is not an easy task to balance the opposing interests, but it is not an impossible one either. It is not necessary to conclude that to protect one of the interests, the other must, of necessity, either be abrogated or substantially subordinated. Success lies in providing a workable formula which encompasses, balances, and protects all interests, yet places emphasis on the fullest responsible disclosure.

S. Rep. No. 813, p. 3, *quoted in Rose*, 425 U.S. at 372-73 n.9.

Thus, our task is to accommodate to the fullest extent possible both the privacy interests of employees and the need of the union to communicate effectively in carrying out its statutory duty of representation, impinging on each interest as slightly as possible. We conclude that both the interests in privacy and disclosure will be optimally served by requiring disclosure of the names and addresses of only those employees who do not request their employers to keep the information confidential. Reasonably applied, this should provide a "workable formula" for carrying out the intent of Congress as embodied in FOIA and the FLMRA.[4]

The decisions of the Authority are affirmed in part and its cross-petitions for enforcement are granted in part. However, because the Authority's orders are broader than permitted by our decision in that they unqualifiedly require disclosure of all employee names and addresses, we remand for further proceedings consistent with this opinion.

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[4] No argument has been raised in the Defense Mapping case that disclosure would violate exemption 1 of FOIA, 5 U.S.C. § 552(b)(1), which exempts from disclosure information required to be kept secret in the interest of national defense pursuant to Executive Order. Nothing in our decision prevents a federal agency from resisting complete, or even selective, disclosure of its employees' names and addresses on the ground that they are covered under exemption 1 of FOIA.

LAY, Chief Judge, concurring in part and dissenting in part.

Although I concur in the majority's judgment that the agency employers must disclose to the unions the names and home addresses of bargaining unit employees, I dissent from the holding that employees may ask their *employers* to keep the information confidential. In my view, this caveat has no basis in law, undermines the rationale for the majority's principal holding, conflicts with decisions of the Second and Fourth Circuit, and fashions a remedy that was not requested or discussed by any party to this action.[1]

Federal agency employers, as a component of their duty to negotiate in good faith with their employees' bargaining representatives, must release to those representatives data that are: (1) reasonably available; (2) normally maintained by the agency in the regular course of business; and (3) necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining. 5 U.S.C. § 7114(b)(4). Having determined that each of these criteria is satisfied, a decision with which I fully concur, the majority then analyzes the excep-

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[1] The FLRA suggested that "to the extent individual employees wish to preserve the privacy of their identities and home addresses, there is no reason to believe that they will not be able to have that information deleted from *union* mailing lists." Brief of FLRA at 31 (emphasis added). The FLRA thus seems to suggest that *after* the employers disclose the names and addresses to the unions, the employees may ask the *union* to delete their names from the mailing lists. This suggestion is quite different from the suggestion that employees may ask the employers not to disclose the information. Under the FLRA's suggested approach, the employers must still comply with the law's disclosure requirements. Under the majority's approach, however, the employees can effectively exempt the employers from complying with the disclosure requirement.

tion to the disclosure requirement: disclosure is not required to the extent that it prohibited by law. 5 U.S.C. § 7114(b)(4). The majority holds that disclosure of the employees' names and address is *not* prohibited by law, and therefore is required. Up to this point the majority's analysis is sound and in accord with the decisions of the Fourth and Second Circuits in *United States Dep't of Health and Human Servs. v. FLRA*, No. 87-3513(L) (4th Cir. Nov. 25, 1987) and *AFGE, Local 1760 v. FLRA*, 786 F.2d 554 (2d Cir. 1986).

The majority then states, however, that "the interests in privacy and disclosure will be optimally served by requiring disclosure of the names and addresses of only those employees who do not request their employers to keep the information confidential." Slip op. at 10. I cannot agree with this analysis. First, there exists no legal authority to support it. Second, it undermines the rationale for requiring disclosure in the first instance, which is that the public interest in collective bargaining and satisfactory performance of the union's statutory duty to represent all employees outweighs the employees' privacy interest, as both the Second and Fourth Circuits have held.

Moreover, it is the function of the *court* to decide whether the employer's duty to bargain in good faith encompass the duty to disclose this information. The *court* must decide whether disclosure is prohibited by law, because that is the only statutory circumstance in which disclosure is not required. Nevertheless, the effect of the majority's approach is to allow each individual employee to decide whether his name and address will be disclosed. Clearly, the Federal Service Labor-Management Relations Act (FSLMRA) contains no such exception to the duty of disclosure that is part of the duty to bargain in good faith. Nor is it consistent with the scheme of the Freedom

of Information Act (FOI) to allow individual government employees to decide whether the privacy exemption applies to them. When confronted with the question of the applicability of the FOIA's privacy exemption, the court cannot abdicate its responsibility by allowing individual employees to decide for themselves the applicability of the exemption.

The FSLMRA provides that the only circumstances in which disclosure of such information is not required is when it is prohibited by law. The court nevertheless holds that disclosure is not required when an individual requests confidentiality. The effect of this decision is to make disclosure of data that have been determined by three circuit courts to be necessary to the collective bargaining process "prohibited by law" at the request of individual employees. Because there is no statutory authority for this decision, and because it conflicts with the proper balancing of interests under the FOIA, I dissent.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 86-2579

THE UNITED STATES DEPARTMENT OF AGRICULTURE AND THE FARMERS HOME ADMINISTRATION FINANCE OFFICE, ST. LOUIS, MISSOURI,

PETITIONERS,

vs.

FEDERAL LABOR RELATIONS AUTHORITY,

RESPONDENT.

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES,

INTERVENOR.

No. 87-1024

THE UNITED STATES DEPARTMENT OF DEFENSE AND DEFENSE MAPPING AGENCY AEROSPACE CENTER, ST. LOUIS, MISSOURI,

PETITIONERS,

vs.

FEDERAL LABOR RELATIONS AUTHORITY,

RESPONDENT.

NATIONAL FEDERATION OF FEDERAL EMPLOYEES,

INTERVENOR.

PETITIONS FOR REVIEW OF THE FEDERAL LABOR RELATIONS AUTHORITY

Intervenor's (American Federation of Govenment Employees) petition for rehearing en banc has been considered by the Court and is denied.

Petition for rehearing has been considered by the Court and is denied.

February 24, 1988

Order entered at the Direction of the Court:

/s/ ROBERT D. ST. VIAN
Clerk, U.S. Court of Appeals, Eighth Circuit.

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 86-2579

THE UNITED STATES DEPARTMENT OF AGRICULTURE, ET AL,
PETITIONERS,

vs.

FEDERAL LABOR RELATIONS AUTHORITY,
RESPONDENT.

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES,
INTERVENOR.

PETITION FOR REVIEW OF THE FEDERAL LABOR RELATIONS AUTHORITY

No. 87-1024

THE UNITED STATES DEPT. OF DEFENSE AND DEFENSE MAPPING AGENCY AEROSPACE CENTER, ST. LOUIS, MISSOURI,
PETITIONERS,

vs.

FEDERAL LABOR RELATIONS AUTHORITY,
RESPONDENT.

NATIONAL FEDERATION OF FEDERAL EMPLOYEES,
INTERVENOR.

PETITION FOR REVIEW OF AN ORDER OF THE FEDERAL LABOR RELATIONS AUTHORITY

The following petitions for rehearing en banc have been considered by the Court and are denied:

The U.S. Department of Defense and Defense Mapping Agency Aerospace Center

Federal Labor Relations Authority

Petitions for rehearing by the panel are also denied.

March 29, 1983

Order entered at the Direction of the Court:

/s/ ROBERT D. ST. VIAN
Clerk, U.S. Court of Appeals, Eighth Circuit.

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Nos. 86-2579 and 87-1024

THE UNITED STATES DEPARTMENT OF AGRICULTURE, ET AL,
PETITIONERS,

VS.

FEDERAL LABOR RELATIONS AUTHORITY,
RESPONDENT.

PETITIONS FOR REVEIW OF ORDERS OF THE FEDERAL LABOR RELATIONS AUTHORITY

AMENDED ORDER

Petitions for rehearing en banc of petitioners (United States Department of Agriculture, et al) and respondent (Federal Labor Relations Authority) have been considered by the Court and are denied.

Petitions for rehearing by the panel are also denied.

April 1, 1988

Order entered at the Direction of the Court:

/s/ ROBERT D. ST. VIAN
Clerk, U.S. Court of Appeals, Eighth Circuit.

APPENDIX F

23 FLRA No. 101

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

Case No. 7-CA-30560 (19 FLRA No. 21)

FARMERS HOME ADMINISTRATION FINANCE OFFICE,
ST. LOUIS, MISSOURI

RESPONDENT

and

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES,
AFL-CIO, LOCAL 3354

CHARGING PARTY

DECISION AND ORDER ON REMAND

I. Statement of the Case

This case is before the Authority pursuant to a remand from the United States Court of Appeals for the District of Columbia Circuit. The question before the Authority is whether it was an unfair labor practice under the Federal Service Labor-Management Relations Statute (the Statute) for the Respondent (Agency) to refuse a request, made pursuant to section 7114(b)(4) of the Statute, to provide the Charging Party (Union) with the names and home addresses of employees in a bargaining unit which the Union exclusively represents.

For the reasons which follow, we conclude that Respondent's refusal to provide the information violated the Statute, and we reverse the Authority's previous decision in this matter.

II. Procedural Background

In a previous decision in this case, *Farmers Home Administration Finance Office, St. Louis, Missouri,* 19 FLRA No. 21 (1985), the Authority, relying on the decision of the United States Court of Appeals for the Fourth Circuit in *American Federation of Government Employees, Local 1923 v. United States Department of Health and Human Services,* 712 F.2d 931 (4th Cir. 1983), held that the release of home addresses was not required pursuant to section 7114(b)(4) of the Statute because the disclosure of such information was "prohibited by law," specifically the Privacy Act.[1]

The Charging Party/Union in this case, and the unions involved in other cases in which the Authority followed the precedent established by this case, petitioned the courts for review of the Authority's decisions. In the course of the litigation that ensued, it became apparent that an issue raised before the Authority regarding the applicability of the Privacy Act had not been addressed by the Authority in rendering its decision in this case—namely, whether the union was entitled to the names and home addresses of unit employees under the routine use exception of the Privacy Act, 5 U.S.C. § 552a(b)(3). The Authority therefore sought remand of this case and three other substantially identical cases awaiting judicial review in order to reconsider its decisions and to address in the first instance the issue of whether disclosure of the names and home addresses of unit employees was or was not prohibited by law because of the applicability of the "routine use" exception of the Privacy Act, and such other issues arising under the Statute as might be appropriate. The remand requests were granted in this case, *American Federa-*

[1] Privacy Act of 1974, 5 U.S.C. § 552a (1982).

tion of Government Employees, Local 3354 v. FLRA, No. 85-1493 (D.C. Cir.) (reviewing 19 FLRA No. 21), and in two others, *National Federation of Federal Employees, Local 1827 v. FLRA*, No. 85-2202 (8th Cir.) (reviewing 19 FLRA No. 85) and *Philadelphia Metal Trades Council v. FLRA*, No. 85-1625 (D.C. Cir.) (reviewing 19 FLRA No. 107).

In contrast to the D.C. and Eighth Circuits, the United States Court of Appeals for the Second Circuit denied the Authority's remand request and issued a decision. In that decision the Second Circuit reversed the Authority's holding that the release of names and home addresses was "prohibited by law," *i.e.*, the Privacy Act, under section 7114(b)(4) of the Statute. *American Federation of Government Employees, Local 1760 v. FLRA*. 786 F.2d 554 (2nd Cir. 1986). The Second Circuit applied the same balancing test used by the Authority. Contrary to the Authority and the Fourth Circuit, however, the court found that "the privacy interest of the average employee in his address is not particularly compelling." *Id.* at 556. Instead, the court noted Congress' determination that collective bargaining is in the public interest, and the court's prior holdings in private sector cases that the mere existence of alternative means of communication is not sufficient to justify the refusal to release home addresses. The court also noted that it agreed with the Administrative Law Judge that the alternative means available to the union were inadequate, and that the other requirements of the Statute for release had been met. The court therefore remanded that case (19 FLRA No. 108) to the Authority to find a violation and require the Respondent to disclose unit employees' home addresses to the union. The court did not address the "routine use" issue.

In order to give full consideration to the issues raised as to the disclosure of names and home addresses to exclusive

representatives in the instant case, and in the other cases remanded by the D.C. and Eighth Circuits as well as other pending cases, the Authority issued a notice in the *Federal Register,* 51 Fed. Reg. 21,416 (1986), providing an opportunity for all interested agencies, labor organizations, and other interested persons to file *amicus* briefs dealing with these issues. The Authority has considered these submissions, as well as the entire record in this case, in reaching its decision. Although the parties in this case did not submit supplementary statements in response to the Federal Register notice, the American Federation of Government Employees did file an *amicus* brief outlining its position on the issues presented by these cases.

III. Analytical Framework and Previous Decision

As relevant to this case, section 7114(b)(4) of the Statute requires an agency to furnish to an exclusive representative, upon request and to the extent not prohibited by law, data which is (1) normally maintained by the agency in the regular course of business; and (2) reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining. In the previous decision in this case, the Authority held that the release of names and home addresses was not required pursuant to section 7114(b)(4) because disclosure was "prohibited by law," specifically the Privacy Act.

The Privacy Act generally prohibits the disclosure of personal information about Federal employees without their consent. Section (b)(2) of the Privacy Act provides that the prohibition against disclosure is not applicable if disclosure of the information is required under the Freedom of Information Act (FOIA).[2] Exemption(b)(6) of

[2] Freedom of Information Act, 5 U.S.C. § 552 (1982).

the FOIA provides that information contained in personnel files (as well as medical and other similar files) may be withheld if disclosure of the information would constitute a "clearly unwarranted invasion of personal privacy[.]"

Applying the balancing test developed by the Federal courts in cases concerning the (b)(6) exemption to the FOIA, the Authority weighed the public interest which would be served by providing the Union with names and home addresses against the employees' interests in maintaining their privacy. The Authority concluded that "the employees' strong privacy interest in their home addresses outweighs the necessity of the data for the Union's purposes in the circumstances of this case." 19 FLRA No. 21 at 4. Since the information requested by the Union fell within the (b)(6) exemption, disclosure of the information was not required under the FOIA. Therefore, the Authority found that the requirements of the (b)(2) exception to the Privacy Act were not met and disclosure of the information was prohibited. The Authority also found that the record established that the Union had "alternative means of . . . comunication available." *Id.* Because of the finding that disclosure of the information was prohibited by law, the Authority did not address whether the Union's request met the other requirements of section 7114(b)(4).

IV. Analysis on Remand

Consistent with the requirements of section 7114(b)(4), it is necessary to determine whether (1) disclosure of the names and home addresses of bargaining unit employees is prohibited by law, (2) the information is normally maintained by the Agency in the regular course of business, (3) the Union properly requested the information, and (4) the information is reasonably available and necessary within the meaning of that section. These issues will be addressed in turn.

A. Prohibited by Law

Provisions of the Privacy Act and the Freedom of Information Act are relevant to the determination of whether the disclosure of the information is prohibited by law. The Authority previously held that disclosure was prohibited by the Privacy Act. There are two exceptions to the Privacy Act's bar to disclosure which are applicable to this discussion: exception (b)(2) concerning the Freedom of Information Act, and exception (b)(3) relating to "routine use" of information.

1. FOIA

If the disclosure of the requested information is required by the FOIA, the Privacy Act's bar to disclosure is not applicable. 5 U.S.C. § 552a(b)(2). Under the FOIA, requested information must be disclosed unless it falls within one of the enumerated exemptions. The exemption pertinent to this case is exemption (b)(6) which authorizes withholding information in "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy[.]"

In the previous decision in this case, the Authority balanced employees' privacy interests against the public interest in disclosure and found that the requested information fell within exemption (b)(6). In doing so, the Authority relied on the decision of the Court of Appeals for the Fourth Circuit in *AFGE Local 1923*, 712 F.2d 931. For the following reasons, we reverse our previous decision on this point and find that the requested information may not be withheld pursuant to exemption (b)(6).

It is necessary to balance competing interests to determine whether requested information falls within exemption (b)(6). It is also important to recognize, as emphasized in the *amicus* submissions filed by various labor

organizations, that the FOIA embodies "a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language." *Department of Air Force v. Rose,* 425 U.S. 352, 360-61 (1976). Further, exemption (b)(6)'s limitation to "clearly unwarranted" disclosures instructs us to "tilt the balance in favor of disclosure." *Getman v. NLRB,* 450 F.2d 670, 674 (D.C. Cir. 1971).

Consistent with this framework, we find that the balance favors disclosure of the names and home addresses sought by the Union. In section 7101 of the Statute Congress found that collective bargaining in the Government is in the public interest and safeguards that interest. The disclosure of the information sought would enable the Union to identify the members of the bargaining unit which it is required to represent. Disclosure also would contribute to the Union's ability to communicate with its bargaining unit members and thereby enable it to better fulfill its responsibilities under the Statute. If employees are to exercise their statutory rights, they must be aware of the issues affecting them. By providing the Union with an efficient method of communication, disclosure of names and home addresses will facilitate the fullest exercise of employee rights.

On further consideration of this case, we also agree with the Court of Appeals for the Second Circuit that "the privacy interest of the average employee in his address is not particularly compelling." 786 F.2d at 556. For example, while *amicus* submissions by individuals indicate that some employees do not favor the release of their names and home addresses, many of the submissions also show that these employees already receive and often discard unsolicited mail. There is, of course, nothing to prevent these employees from handling communications from the Union in the same way, nor are employees prevented from

requesting that they be deleted from the Union's mailing list. As noted by the Second Circuit, a union already has access to information such as salary levels that is more likely to implicate privacy concerns than the information sought here. *Id.*

On balance, we find that the public interest to be furthered by providing the Union with an efficient method to communicate with unit employees it must represent far out-weighs the privacy interests of individual employees in their names and home addresses. Disclosure of the requested information would not constitute a clearly unwarranted invasion of personal privacy and does not fall within the (b)(6) exemption to the FOIA. Since the information does not fall within the exemption, its disclosure is required under the FOIA and, under exception (b)(2) to the Privacy Act, its release is not prohibited by law.

2. Routine Use

Exception (b)(3) of the Privacy Act permits disclosure of information for a "routine use." Section (a)(7) of the Privacy Act defines routine use as "the use of such record for a purpose which is compatible with the purpose for which it was collected." The Office of Personnel Management (OPM) publishes notices defining the routine uses of personnel records of Federal employees. One notice defines a routine use as the disclosure of information to "officials of labor organizations recognized under 5 U.S.C. Chapter 71 when relevant and necessary to their duties of exclusive representation[.]" 49 Fed. Reg. 36,956 (1984). This standard is effectively the same as section 7114(b)(4)'s limitation of an agency's obligation to provide information to that which is "necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining[.]"

As discussed below, we conclude that the disclosure of the names and home addresses of bargaining unit employees to the Union is necessary within the meaning of section 7114(b)(4) of the Statute for the Union to discharge its statutory obligations. Consistent with that conclusion, we find that disclosure of the information sought here falls within the routine use established by OPM, and its disclosure is therefore a routine use under exception (b)(3) of the Privacy Act. Therefore, even if the disclosure was not authorized under exception (b)(2) of the Privacy Act, relating to the FOIA, it is authorized under exception (b)(3).

Release of the requested information is therefore not prohibited by law. It may be released pursuant to exceptions (b)(2) and (3) of the Privacy Act.

B. Normally Maintained by the Agency

The Administrative Law Judge found that the names and home addresses sought by the Union were maintained by the Respondent in Official Personnel Files (OPFs), a card index system, and a computer file. He concluded that the information was normally maintained in the regular course of business. We agree and find that the requested information is normally maintained by the Agency in the regular course of business within the meaning of section 7114(b)(4) of the Statute.

We note that although OPM retains responsibility for OPFs, they are physically maintained by employing agencies. While agency *amici* question whether OPFs are the best source for current home addresses, the Department of Justice notes in its *amicus* submission that there is "no question that the home addresses of federal employees . . . are in their personnel files."

C. Union Request

The Union requested in writing the names and home addresses of bargaining unit employees to enable it to prepare for contract negotiations. Although not raised in this case, some *amicus* submissions questioned whether a request must be tied to a specific issue about which the union needs to communicate with its bargaining unit members.

As discussed throughout this decision, a union's statutory obligations involve a broad range of representational activities. We find that the statutory requirement concerning sufficiency of a request under section 7114(b)(4) is satisfied for requests such as that involved here when a general written request for the information is made. A precise explication of the reasons for the request involved here is not necessary. The requirement for a request was met in this case.

Our conclusion that a written request for names and home addresses need not contain an explanation of the reason for the request is consistent with previous decisions where we held that an agency's duty to furnish other information under section 7114(b)(4) of the Statute turns on the nature of the request and the circumstances of each case. *For example, Department of Health and Human Services, Social Security Administration and Social Security Administration, Field Operations, New York Region*, 21 FLRA No. 35 (1986). In our view, an exclusive representative's need for the names and home addresses of the bargaining unit employees it is required to represent is so apparent and essentially related to the nature of exclusive representation itself, that unlike requests for certain types of other information, an agency's duty to supply names and home addresses information does not depend upon any separate explanation by the union of its reasons for seeking the information.

D. Reasonably Available and Necessary

As discussed previously in connection with the statutory requirement that the requested information be normally maintained by the agency, the names and home addresses of bargaining unit employes are contained in OPFs and, in this case, the ALJ found that the information was also available through an index system and a computer file. The information is reasonably available within the meaning of section 7114(b)(4).

As for whether the information is necessary for unions to discharge their responsibilities under the Statute, the *amicus* submissions show disagreement among the parties. Generally, unions argued that the disclosure of names and home addresses is necessary for them to meet their statutory obligations. Agencies contended that these obligations could be fulfilled without disclosure of the information, through effective alternative means of communication.

Section 7114(a)(1) of the Statute provides that an exclusive representative is responsible for representing the "interests of all employes in the unit it represents without discrimination and without regard to labor organization membership." Under this provision, a union's statutory responsibilities extend to all bargaining unit members. It is obvious that a union must be able to identify and communicate with those bargaining unit members if it is to adequately represent them.

Consistent with the *amicus* submissions of many agencies, the ALJ in this case found that the disclosure of names and home addresses was unnecessary because other means of communication, such as desk drops, direct distributions, meetings, bulletin boards, and direct personal contacts were available to the Union and provided adequate means of communication. We disagree. The disclosure of names and home addresses will enable the

Union to communicate effectively and efficiently, through direct mailings to individual employees. The information is readily available within Agency files and its disclosure will enhance the exercise of employee rights as well as the communication process between employees and the Union.

We will not review the adequacy of alternative methods of communication on a case-by-case basis. Consistent with the view of the Court of Appeals for the Second Circuit discussed above, we find that the mere existence of alternative means of communication is insufficient to justify a refusal to release the information. Further, we find that it is not necessary for us to examine the adequacy of alternative means in cases involving requests for names and home addresses because the communication between unit employees and their exclusive representative which would be facilitated by release of names and home addresses information is fundamentally different from other communication through alternative means which are controlled in whole or in part by the agency. When using direct mailings, the content, timing, and frequency of the communication is completely within the discretion of the union and there is no prossibility of agency interference in the distribution of the message. Further, direct mailings reach unit employees in circumstances where those employees may consider the union's communication without regard to the time constraints inherent in their work environments, and in which any restraint the employee may feel as a result of the presence of agency management in the workplace is not present. We find that the names and home addresses of unit employees are necessary and should be provided whether or not alternative means of communication are available.

Our decision that names and home addresses information should be released is consistent with private sector

precedent.[3] The National Labor Relations Board has held that names and addresses of unit employees are "presumptively relevant to [a] [u]nion's role as bargaining agent either during contract negotiations or during the term of an agreement." *Georgetown Holiday Inn*, 235 NLRB 485, 486 (1978).[4] The Board has not treated the presumption favoring the disclosure of names and home addresses as an irrebuttable one. Disclosure need not be made in situations where, for example, the evidence discloses that a union has acted in a manner which leads to the conclusion that the employees whose addresses would be disclosed would be in

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[3] The National Labor Relations Act (NLRA) does not contain a provision equivalent to section 7114(b)(4) of the Statute. Rather, union's rights to receive information are an outgrowth of the obligation to bargain in good faith under section 8(a)(5) of the NLRA. For a discussion of the private sector obligation *see NLRB v. Acme Industrial Company,* 385 U.S. 432 (1967). *See also Prudential Insurance Co. v. NLRB*, 412 F.2d 77 (2d Cir.), *cert. denied,* 396 U.S. 928 (1969), where the court rejected the company's arguments that providing names and home addresses was unnecessary because adequate alternative means of communication (bulletin boards, grievance committees, hand distributions, and union meetings) were available to the union. As for the relevance of the information, the court stated "[i]t seems manifest beyond dispute that the Union cannot discharge its obligation unless it is able to communicate with those in whose behalf it acts." *Id.* at 84.

[4] *See also Armstrong World Industries, Inc.*, 254 NLRB 1239, 1244 (1981), where the Administrative Law Judge, whose decision was adopted by the Board, cited the Board's previous decision in *Autoprod, Inc.*, 223 NLRB 773 (1973), and stated that the *Autoprod* decision "appears to state flatly that a union is entitled to the addresses of unit employees, whether or not those addresses could be obtained by other means and, *a fortiori*, whether or not the union might be able to disseminate information to unit employees by other means than mailing." This statement also appears in the ALJ's decision in *Harco Laboratories, Inc.*, 271 NLRB 1397, 1398 (1984), which was also adopted by the Board.

imminent danger if the union knew where they lived. *See, for example, Shell Oil Co. v. NLRB,* 457 F.2d 615 (9th Cir. 1972). There is no such contention in this case.

V. Conclusion

We have considered the entire record in this case as well as the *amicus* submissions filed in response to our notice in the *Federal Register.* We conclude that the release of names and home addresses to the Union is not prohibited by law, is necessary for the Union to fulfill its duties under the Statute, and meets the other requirements of section 7114(b)(4).

Respondent was required to furnish the names and home addresses requested by the Union without regard to whether alternative means of communication were available or adequate. Respondent's refusal to furnish the requested information violated section 7116(a)(1), (5) and (8) of the Statute.

ORDER

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute, it is ordered that the Farmers Home Administration Finance Office, St. Louis, Missouri shall:

1. Cease and desist from:

(a) Refusing to furnish, upon request of the American Federation of Government Employees, AFL-CIO, Local 3354, the exclusive representative of its employees, the names and home addresses of all employees in the bargaining unit it represents.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights assured them by the Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Upon request by the American Federation of Government Employees, AFL-CIO, Local 3354, the exclusive representative of its employees, furnish it with the names and home addresses of all employees in the bargaining unit it represents.

(b) Post at all its facilities where bargaining unit employees represented by the American Federation of Government Employees, AFL-CIO, Local 3354 are located, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by a senior official of the Farmers Home Administration Finance Office, St. Louis, Missouri, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region VII, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply.

Issued, Washington, D.C., October 31, 1986.

/s/ JERRY L. CALHOUN
Jerry L. Calhoun, Chairman

/s/ HENRY B. FRAZIER III,
Henry B. Frazier III, Member

/s/ JEAN MCKEE
Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

NOTICE TO ALL EMPLOYEES
PURSUANT TO
A DECISION AND ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY
AND IN ORDER TO EFFECTUATE THE POLICIES OF
CHAPTER 71 OF TITLE 5 OF THE
UNITED STATES CODE
FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS
WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT refuse to furnish, upon request of the American Federation of Government Employees, AFL-CIO, Local 3354, the exclusive representative of our employees, the names and home addresses of all employees in the bargaining unit it represents.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights assured them by the Federal Service Labor-Management Relations Statute.

WE WILL, upon request by the American Federation of Government Employees, AFL-CIO, Local 3354, the exclusive representative of our employees, furnish it with the names and home addresses of all employees in the bargaining unit it represents.

_____
(Agency or Activity)

Dated: _____ By: _____
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Region VII, Federal Labor Relations Authority, whose address is: 535 16th Street, Suite 310, Denver, Colorado 80202 and whose telephone number is: (303) 837-5224.

APPENDIX G

19 FLRA No. 21

UNITED STATES OF AMERICA BEFORE THE FEDERAL LABOR RELATIONS AUTHORITY WASHINGTON, D.C.

Case No. 7-CA-30560

FARMERS HOME ADMINISTRATION FINANCE OFFICE, ST. LOUIS, MISSOURI

RESPONDENT

and

AMERICAN FEDERATION OF GOVERMENT EMPLOYEES, AFL-CIO, LOCAL 3354

CHARGING PARTY

DECISION AND ORDER

The Administrative Law Judge issued the attached Decision in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint, and recommending that the complaint be dismissed in its entirety. The General Counsel and the Respondent filed exceptions to the Judge's Decision, and the Respondent filed an opposition to the General Counsel's exceptions.

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute (the Statute), the Authority has reviewed the rulings of the Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Judge's Decision and the entire record, the

Authority hereby adopts the Judge's findings, conclusions and recommended Order, as modified herein.

The Judge concluded that the Respondent had not failed to comply with the requirements of section 7114(b)(4) of the Statute[1] when it refused to provide the Union, upon request, with the names and home addresses of all the unit employees represented by the exclusive representative. In this regard, the Judge found that such material was not "necessary for a full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining" in view of the alternative means available to the Union by which to communicate with the employees whom it represents.

The Authority agrees with the Judge that the actions of the Respondent in this case did not constitute a violation of section 7116(a)(1), (5) and (8) of the Statute. In so concluding, however, the Judge did not address the primary defense raised by the Respondent in this matter, *i.e.*, that the disclosure of the names and home addresses of the

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[1] Section 7114(b)(4) of the Statute provides:

> **§ 7114. Representation rights and duties**
>
> * * * * *
>
> (b) The duty of an agency and an exclusive representative to negotiate in good faith under subsection (a) of this section shall include the obligation –
>
> * * * * *
>
> (4) in the case of an agency, to furnish to the exclusive representative involved, or its authorized representative, upon request and, to the extent not prohibited by law, data –
>
> (A) which is normally maintained by the agency in the regular course of business; [and]
>
> (B) which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining[.]

unit employees herein was precluded by the provisions of the Privacy Act.[2] In a recent decision, *Army and Air Force Exchange Service (AAFES), Fort Carson, Colorado,* 17 FLRA No. 92 (1985) (hereinafter *AAFES*), the Authority pointed out that, in addition to requiring a determination on a case by case basis whether data sought pursuant to section 7114(b)(4) of the Statute meets the requirements of that section, *i.e.,* whether it has been requested, whether it is normally maintained, whether it is reasonably available, and whether it is necessary to enable a union to fulfill its representational obligations, section 7114(b)(4) of the Statute also limits an agency's obligation to furnish data "to the extent not prohibited by law," which incorporates the Privacy Act.

The Privacy Act regulates the disclosure of any information contained in an agency "record" within a "system of records that is retrieved by reference to an individual name or some other identifier."[3] The names and home addresses of unit employees constitutes information which is retrievable from an agency's records by reference to an individual's name and therefore would be prohibited from disclosure unless one of the specific Privacy Act exceptions is applicable. *See AAFES, supra.* One such exception to the Privacy Act's protection is contained in 5 U.S.C. § 552a(b)(2) which permits disclosure of information "required" to be released under the Freedom of Information Act (FOIA).[4] In general, the theory of the FOIA is that Federal government records should be disclosed in order to enable the public to review the actions of the govern-

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[2] Privacy Act of 1974, Pub. L. No. 83-579, 88 Stat. 1896 (codified as amended at 5 U.S.C. § 552a (1982)).

[3] 5 U.S.C. § 552a(a)(4), (5) (1982).

[4] Freedom of Information Act, Pub. L. No. 89-487, 80 Stat. 256 (codified as amended at 5 U.S.C. § 552 (1982)).

ment. However, there are also exemptions to the general disclosure requirements of the FOIA. Under exemption (b)(6) of the FOIA, an agency is allowed, *e.g.*, to withhold personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy. In determining whether material may be properly withheld in accordance with exemption (b)(6) of the FOIA, the Federal courts have struck a balance between the individual's privacy interest and the possible adverse or harmful effects on the individual which could result from disclosure, on the one hand, against the importance of the public's interest in having the information made available.[5] In *AAFES, supra,* the Authority indicated that in determining whether data sought under section 7114(b)(4) is or is not otherwise "prohibited by law," the Authority will use the same test applied by the courts in evaluating FOIA requests under the 5 U.S.C. § 522(b)(6) exemption, *i.e.*, balancing the necessity of the data for the union's purposes against the degree of intrusion on the individual's privacy interests caused by disclosure of the data.[6]

In applying the foregoing balancing test to determine whether the Union is entitled to the names and home addresses of unit employees herein, the Authority has been guided by the decision of the Fourth Circuit in *American Federation of Government Employees, AFL-CIO, Local 1923 v. United States Department of Health and Human Services,* 712 F.2d 931 (4th Cir. 1983) (hereinafter *AFGE v. HHS*), wherein an exclusive representative sought the home addresses of all unit employees pursuant to the

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[5] *See, e.g., Department of the Air Force v. Rose,* 425 U.S. 352 (1976).

[6] *See also Bureau of Alcohol, Tobacco and Firearms, National Office, Washington, D.C.,* 18 FLRA No. 74 (1985).

FOIA. In adopting the lower court's conclusion that the balance of all factors favored nondisclosure, the Fourth Circuit stated in pertinent part (712 F.2d at 932):

> Employees have a strong privacy interest in their home addresses. Disclosure could subject the employees to an unchecked barrage of mailings and perhaps personal solicitations, for no effective restraints could be placed on the range of uses to which the information, once revealed, might be put. Further, even granting that collective bargaining is a matter of grave public concern, any benefits flowing from disclosure of the information sought would inure primarily to the union, in a proprietary sense, rather than to the public at large. Finally, as the District Court noted, alternative means of communication are available to the union, such as its bulletin board and indirect distribution through the employer. (footnote omitted.)

The same findings flow from the similar facts of the present case. Thus, for the reasons stated by the Fourth Circuit in *AFGE v. HHS*, we find that the employees' strong privacy interest in their home addresses outweighs the necessity of the data for the Union's purposes in the circumstances of this case. Moreover, the Court noted that alternative means of communication with unit employees were available to the union in *AFGE v. HHS*, and the record in this case clearly establishes that the Union herein had alternative means of such communication available.[7]

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[7] In this regard, the Union could have communicated with unit employees through "desk drops" of information as authorized by the parties' collective bargaining agreement; direct distributions at entrances; meetings in conference rooms provided by management under the negotiated agreement; bulletin boards; and union stewards who had access to unit employees at their workplace.

Further, as noted by the Fourth Circuit in *AFGE v. HHS*, the records sought by the Union herein, *i.e.*, the names and addresses of unit employees, are not of the type that generally must be disclosed pursuant to the FOIA's (b)(6) exemption for the purposes for which they were sought herein. As the Court stated:

> The purpose of the [FOIA] is " 'to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny . . . .' "
>
> * * * * *
>
> The home addresses sought by appellant have nothing to do with the agency's "work," and disclosure thereof would shed no significant light on the agency's inner workings. (citations and footnote omitted.) 712 F.2d 933.

Thus, the Authority finds that the disclosure of unit employees' names and home addresses for the purposes for which they were sought herein was "prohibited by law" and that their release by the Respondent therefore was not required pursuant to section 7114(b)(4) of the Statute. Therefore, the Authority concludes that the Respondent did not fail to comply with section 7114(b)(4) of the Statute in violation of section 7116(a)(1), (5) and (8) of the Statute when it refused to provide the exclusive representative with the names and home addresses of unit employees.[8] Accordingly, the Authority shall order that the complaint be dismissed.

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[8] In so concluding, the Authority does not reach the question of whether the data sought herein meets the other requirements of section 7114(b)(4) of the Statute.

ORDER

IT IS ORDERED that the complaint in Case No. 7-CA-30560 be, and it hereby is, dismissed in its entirety.

Issued, Washington, D.C., July 22, 1985

/s/ HENRY B. FRAZIER III,
Henry B. Frazier III, Acting Chairman

/s/ WILLIAM J. MCGINNIS, JR.
William J. McGinnis, Jr., Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, DC 20424

Case No.: 7-CA-30560

FARMERS HOME ADMINISTRATION FINANCE OFFICE,
ST. LOUIS, MISSOURI

RESPONDENT

and

AMERICAN FEDERATION OF GOVERMENT EMPLOYEES,
LOCAL 3354, AFL-CIO

CHARGING PARTY

James M. Carroll, Esquire
For the Respondent

Nicholas J. LoBurgio, Esquire
For the General Counsel

Mr. Steven M. Hollis
For the Charging Party

Before: LOUIS SCALZO, Administrative Law Judge

DECISION

Statement of the Case

This case arose as an unfair labor practice proceeding under the provisions of the Federal Service Labor-Management Relations Statute, 92 Stat. 1191, 5 U.S.C. § 7101, *et seq.* (hereinafter referred to as "the Statute"), and the Rules and Regulations issued thereunder.

The complaint, based upon a charge filed by the American Federation of Government Employees, Local

3354. AFL-CIO (Charging Party or Union), alleges that since on or about August 18, 1983, the Farmers Home Administration, St. Louis, Missouri (Respondent), has failed and refused to respond to a July 20, 1983, Union request for a list of names and home addresses of bargaining unit employees represented by the Union at Respondent's St. Louis, Missouri facilities. The complaint alleges further that the Union is entitled to the list under the provisions of Section 7114(b)(4) of the Statute, and that Respondent's failure and refusal to respond constitutes an unfair labor practice within the meaning of Sections 7116(a)(1), (5) and (8) of the Statute.

Counsel representing the Respondent argues that the refusal to produce the list was not violative of the Statute, and that disclosure of employee home addresses is otherwise prohibited by the Privacy Act, 5 U.S.C. § 552. It is contended further that Section 7114(b)(4) of the Statute, exempts disclosures which would be violative of the Privacy Act. Counsel also argues that the list of names sought is not "necessary" for any purpose referred to in Section 7114(b)(4) of the Statute.

The parties were represented by counsel during the hearing and were afforded full opportunity to be heard, adduce relevant evidence, and examine and cross-examine witnesses. Based upon the entire record herein, including exhibits, and other relevant evidence adduced at the hearing,[1] and briefs filed by the parties, I make the following findings of fact, conclusions and recommendations.

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[1] Counsel representing the General Counsel moved to correct errors in the hearing transcript. Under Authority reflected in 5 C.F.R. § 2423.19(r), the proposed corrections are approved with the exception of the proposed correction at Tr. 64:10. An examination of this reference in the transcript reflects no error of the type noted in the motion.

Findings of Fact

Circumstances Surrounding Union Efforts to Obtain Names and Addresses of Bargaining Unit Members

The bargaining unit represented by the Union is comprised of Respondent's non-professional general schedule and wage grade employees located in the Finance Home Administration Finance Office in St. Louis, Missouri. The bargaining unit is comprised of about 903 members out of a total of approximately 1050 to 1110 of Respondent's employees assigned to Respondent's St. Louis facilities (Tr. 19-20, 35, 90). A total of 150 employees in the bargaining unit are members of the Union (Tr. 20, 25). Bargaining unit members reside in the St. Louis metropolitan area (Tr. 20).

A collective bargaining agreement governing the relations of the parties expired in May of 1983, but remained in effect pending completion of contract negotiations (Tr. 20, G.C. Exh. No. 2). The parties commenced collective bargaining on ground rules in July of 1983, and on August 29, 1983, began negotiations concerning a new collective bargaining agreement (Tr. 20).

By letter dated July 20, 1983, Mr. Steve Hollis, President of the Union wrote to Mr. Clarence P. Squellati, Respondent's Director, and requested a list of the names and home addresses of all bargaining unit members (G.C. Exh. No. 3).[2] The letter requested an early response because of then anticipated contract negotiations, and outlined the following reasons for the Union's request:

> This information is need (sic) by the local so that we will be able to communicate effectively with the

[2] The record disclosed that the home addresses sought by the Union are retained by the Respondent in official personnel files, in a card index system, and in a computer file (Tr. 24).

> employees in the unit to obtain their views on bargaining priorities, and to learn their problems, thereby allowing the local to frame intelligent collective bargaining proposals for our pending contract negotiations.
>
> For a number of reasons such as the low percentage of unit members who are members of the union, the limited number of stewards, the limited number of [bulletin] boards available to the union, the location of unit employees, the limited use of the internal mail system, the limited allowance for desk drop and other factors, the available communication channels are inadequate for full and proper discussion, understanding and negotiation of subjects within the scope of collective bargaining.

In a letter dated August 18, 1983, the request was denied on the ground that disclosure of home addresses without employee consent would constitute a violation of the Privacy Act (G.C. Exh. No. 4).

During the hearing Mr. Hollis explained further that he wished to utilize the mails to communicate with all bargaining unit employees in the privacy of their homes; that he wished to do this during the then pending contract negotiations, and on subsequent occasions (Tr. 21); and that he wished to provide a private atmosphere for bargaining unit members to read and respond to Union requests for opinions and information concerning matters of interest to the Union and bargaining unit members (Tr. 22). Mr. Hollis acknowledged freely that addresses were vitally needed in connection with membership drives, and that some efforts had been made by the Union to develop a list of addresses for the purpose of recruiting new members (Tr. 93-94). He testified that employees would

more readily join the Union if addressed personally on issues of concern to them (Tr. 94-95).

Following denial of the Hollis request an effort was made by the Union to obtain home addresses directly from bargaining unit members. This was affected primarily through the distribution of "contract surveys" designed to obtain a priority ranking of contract issues by employees responding (Tr. 30). Space for a home address was provided on the survey form which was distributed through a "desk drop."[3] However, the record disclosed no significant effort to go directly to employees specifically for the purpose of obtaining home addresses, although the "desk drop" was available for this purpose (Tr 93-94). Failure to do so was attributed to the need to accomplish such work on non-duty time, to unwillingness on the part of stewards to contribute non-duty time; and to difficulty encountered in recruiting volunteers (Tr. 92-94). The Union efforts described were specifically associated with Union activity designed to obtain home addresses needed primarily for the recruiting of new members (Tr. 93-94). The efforts made did produce about 100 addresses of bargaining unit members who were not Unit members (Tr. 86). After adding home addresses of Union members on file, it was estimated that a maximum of about 650 home addresses of non-Union bargaining unit members would he needed to develop a complete list of bargaining unit member home addresses (Tr. 90).

It was established by Mr. Hollis' testimony that Union officials could simply ask bargaining unit members for their home addresses, if they were inclined to do so (Tr.

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[3] The "desk drop," an approved means of access provided to the Union under the terms of the collective bargaining agreement will be hereinafter discussed in more detail. It involved direct placement of Union literature on the desks of bargaining unit members.

108). In situations were Union officials have requested employees for their home addresses, employees have refused to comply in only "one or two" instances (Tr. 110).

Circumstances Relating to Union Access to Bargaining Unit Members

With the exception of about 14 bargaining unit employees, bargaining unit members work in an office building located at 1520 Market Street, St. Louis, Missouri (Tr. 36, 88).[4] The small group of 14 is located in a warehouse facility in Granite City, Illinois, a community situated within the St. Louis metropolitan area (Tr. 88). The Market Street address is a four story building controlled by the General Services Administration. The first three floors are utilized to house Respondent's employees (Tr. 89). Other federal agencies maintain offices on the fourth floor (Tr. 89). The building has two exits and two entrances (Tr. 37). Most of the employees utilize a single main entrance (Tr. 37, 89). Most of Respondent's employees work at desks in an office environment (Tr. 89). Upper levels of the building are reached by elevators and stairs (Tr. 89). It is a common practice for the Union to pass out literature at building entrances and at other locations inside the building (Tr. 37-38).

Although employees from other agencies entering the building wear similar clothing and have similar identification badges (Tr. 90), Respondent's work areas are secure, and require an identification badge issued by the Respondent in order to obtain access (Tr. 38). Union representatives have access to Respondent's work areas (Tr. 38-39).

Article 19, Section 19.2 of the collective bargaining agreement provides for the semi-annual disclosure of the

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[4] Since the record reflects a total of about 903 unit members, it is determined that approximately 889 members worked at the Market Street address.

names, grades, and organizational locations of all personnel employed by the Respondent in the St. Louis area (G.C. Exh. No. 2 at page 19). Through the use of such lists, or organizational charts, bargaining unit members may be easily identified by name and job title (Tr. 39-40, R. Exh. No. 1). Information of this nature was in the possession of the Union prior to the filing of the charge (Tr. 40-41).

Article 4 of the agreement provides for Union officer positions, the position of a Chief Steward, and "up to six stewards to represent specific groups of bargaining employees" (G.C. Exh. No. 2 at pages 4-5). Mr. Hollis testified in rather non-specific terms to representational difficulty stemming from the fact that not all stewards work in organizational elements that they represent; however, the record disclosed minimal geographic separation at most between bargaining unit members and Union officials. Mr. Hollis also stated that by agreement the Respondent had allowed a seventh steward position to cover a night shift. (Tr. 91). Reported difficulty encountered as a result of the use of flextime schedules was vague in nature and did not establish the existence of any insurmountable limitation in access due to the existence of flextime schedules (Tr. 95-96).[5] As of the date of the filing of the charge one steward position had not yet been filled by the Union (Tr. 41-42).

Article 19, Section 1 of the agreement imposes upon the Respondent the duty to provide the Union with conference rooms or other suitable space for internal business

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[5] The record disclosed use of a "modified flex-tour" with the majority of employees working a day shift commencing during the hours of 6:30 a.m. and 8:30 a.m. (Tr. 89). Night shifts were also utilized. One began between 2:00 p.m. and 4:00 p.m. A second one commenced between 9:00 p.m. and 11:00 p.m. (Tr. 89-90).

meetings; space for the purpose of conducting individual interviews on matters relating to representational duties; tables, chairs; locked file cabinets; a telephone; copier service; and inclusion of the Union president's name and extension number in the Respondent's telephone directory.

Evidence adduced at the hearing disclosed that Union meetings are usually not well attended (Tr. 99). However, the Respondent has acted to facilitate attendance at Union meetings by allowing employees to adjust lunch schedules to permit attendance (Tr. 45, 75, 76, 99-100), and meetings during the work day on non-duty time have been facilitated (Tr. 75, R. Exh. No. 9). The record disclosed that the Respondent interceded with the General Services Administration to allow the Union to utilize a building public address system on a case by case basis (Tr. 79). The system has been used by the Union for the purpose of announcing Union meetings (Tr. 79-80).

Under the provisions of Article 19, Section 19.13, the Respondent supplies the Union with a 3′ × 4′ bulletin board located in the elevator lobby on the third floor of the Market Street address. Mr. Hollis expressed the opinion that bargaining unit employees did not read bulletin boards, and discounted their value as a means of access (Tr. 101). However, no probative evidence was adduced to establish that the bulletin board was of such slight value.

Article 29, Section 19.4 of the collective bargaining agreement provides:

> The officers and members of the Union who are Employees of the Employer may make personal distribution of their newsletter and other Union publications in the working areas of the Finance Office during non-duty hours of the Employees involved.

The quoted language of the agreement gives the Union the right to utilize "desk drops" for the purpose of communicating with bargaining unit members. All bargaining unit members may be reached through the use of this means of commuication, which has in the past involved the deposit of newsletters and other Union publications on the desks of employees during non-duty time (Tr. 81-82). The Charging Party contended that messages left in this manner were not protected, and could easily be intercepted by supervisors and non-bargaining unit members (Tr. 84-85). It was also claimed that it would not be possible to ascertain which desks were assigned to bargaining unit employees (Tr. 84-85). Nevertheless, the record did establish that newsletters were distributed through "desk drops" for the purpose of soliciting the opinions of bargaining unit members despite the fact that newsletters and "desk drops" were considered inappropriate formats for the dissemination of confidential information, or for "any sort of detailed solicitation of employee views on detailed bargaining positions" (Tr. 27-28).

The Union contended that "desk drops" interfered with employee duties, and that a large percentage of the messages left were discarded (Tr. 84, 87-88). However, the record was quite clear that despite the possibility of work disruption, the Respondent allowed this method of communication during non-duty time under the terms of the collective bargaining agreement. Further, there was no evidence that a direct mailing would have evoked a greater employee response; and claims that a mailing would be more effective, or more confidential in nature were purely speculative in nature as no evidence was introduced to establish either premise.[6] The record reflected no basis for

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[6] The record suggests that the Respondent utilized the "desk drop" method to solicit managerial comments relating to management bargaining proposals (Tr 79).

finding that a wide distribution to all bargaining unit members by mail would produce a greater degree of confidentiality than a similar distribution accomplished through a desk drop. Moreover, information received through "desk drops" might be studied at home by employees (Tr. 104), or during non-duty time, thus refuting contentions that in the absence of mailings to home addresses employees would be precluded from thoroughly studying information distributed.

The possibility of a thorough distribution to individual employees through the "desk drop" method was established by the record (Tr. 81) although it appeared that the Union decided not to utilize this method because of a lack of response to "desk drops." As noted, there was no showing that a mailing would have produced a greater response. Furthermore, it was admitted that although there were approximately 900 employees in the unit, only 600 issuances were distributed by the Union through use of the "desk drop" method (Tr. 87-88).

G.C. Exh. No. 5, a document entitled "Contract Bulletin #4" is an example of a Union attempt to survey bargaining unit member activities to determine Union bargaining positions. Three similar Bulletins were utilized to reach bargaining unit members (Tr. 84). In G.C. Exh. No. 5, the Union cited principal contract issues, requested employees to rate these issues according to priority, and provided space for employees to insert names and home addresses (Tr. 30, 83).[7]

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[7] This document required employees to "[p]lease fill out your name, address, and phone so that we may record your results in our computer and, more importantly, contact you for further discussion." Only sixty-five returned the survey, and only about half of the surveys returned had names and addresses on them (Tr. 30). Most of the surveys in the latter group emanated from Union members whose

In addition to the means of access outlined, the record disclosed that the Union regularly participated in new employee orientation sessions, and that on such occasions the Union has opportunity to obtain employee home addresses (Tr. 47). Also, it was clearly established that the Union has had access to employees for the purpose of obtaining employee signatures on petitions relating to issues of concern to the Union (Tr. 85, R. Exh. Nos. 5 and 6).

Discussion and Conclusions

Section 7114(b)(4) of the Statute provides:

> (b) The duty of an agency and an exclusive representative to negotiate in good faith under subsection (a) of this section shall include the obligation—
>
> * * * * *
>
> (4) in the case of an agency, to furnish to the exclusive representative involved, or its authorized representative, upon request and, to the extent not prohibited by law, data—
>
> (A) which is normally maintained by the agency in the regular course of business;

---

names and addresses were known to the Union (Tr. 30). The meager response to the Union's request for home addresses within the context outlined is understandable since the survey sought much more than names and home addresses. Completion of the survey, and submission to the Union included substantial employee involvement, and an assurance of future Union efforts to obtain participation from employees who supplied their names and addresses. The insignificant response under the circumstances described would not establish an absence of access to bargaining unit employees.

> (B) which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining; and
>
> (C) which does not constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining. . . .

The record clearly establishes that the names and home addresses of bargaining unit members are maintained by the agency in the regular course of business, that such information is reasonably available, and that such data does not constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining. However, a key factual issue is posed concerning the question of whether the names and addresses of bargaining unit members are "necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining" within the meaning of Section 7114(b)(4)(B).

It does not appear that the Authority has had occasion to address the issue of requests for names and addresses of bargaining unit members to aid a Union with respect to representation functions relating to the "negotiation of subjects within the scope of collective bargaining." However, this specific question was resolved by the Federal Labor Relations Council in *Internal Revenue Service, Office of the District Director, Jacksonville District, Jacksonville, Florida,* FLRC No. 72A-50, 2 FLRC 106 (1974).

In sustaining the dismissal of a complaint based upon Section 19(a)(6) of Executive Order 11491, the Council followed the private sector view in such cases[8] and held:

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[8] See A/SLMR No. 214, 2 A/SLMR 523 (1972), and relevant private sector cases cited therein.

. . . [T]he essence of the criteria enunciated by the Assistant Secretary is that an exclusive representative is entitled to and, to the extent necessary, must be provided with effective means of communicating with the employees in the unit. The Council agrees with this determination.

Section 10(e) of the Order provides that a labor organization which has been selected as the exclusive bargaining representative is entitled to act for and to negotiate agreements covering all employees in the unit and it is responsible for representing the interests of all employees in the unit without discrimination and without regard to labor organization membership.

To this end, in our opinion, the implementation of the provisions of section 10(e) of the Order requires that the exclusive representative have effective means of communicating with unit employees. Moreover, agencies, as a part of their obligation to consult, confer, or negotiate with an exclusive representative, must where appropriate, provide an exclusive representative with means of communicating with unit employees and a failure to do so would constitute a violation of section 19(a)(6).

A determination of whether an exclusive representative in fact has effective means of communicating with unit employees must be made on a case-by-case basis. In many instances, little or no action by the agency would be necessary to supplement the means of communication readily available to the union on its own initiative. On the other hand, in some instances where because of such factors as the size of unit, geographic dispersion of employees, isolated

> duty locations, etc., the union may not have effective means of communicating with the unit employees. In such situations, as stated above, the proper implementation of the Order might require that the agency assist the exclusive representative in facilitating such communication, consistent with law and regulation, e.g., by providing the union with the periodic use of the intraagency mailing system or addressing envelopes containing union material and depositing those envelopes in the U.S. mail for delivery to employees at their home addresses. A failure to provide the exclusive bargaining representative such access to employees in the unit, where required, would constitute a failure on the part of the agency to meet its obligation to consult, confer, or negotiate with the exclusive representative in violation of section 19(a)(6) of the Order.

On the basis of the record developed, the Assistant Secretary and the Council determined that the National Treasury Employees Union did in fact have effective means of communicating with unit employees. Accordingly, it was held that the Internal Revenue Service had no obligation to provide that union with additional means of communication.

This rule was applied recently by Administrative Law Judge Isabelle R. Cappello in *Defense Mapping Agency Aerospace Center, St. Louis, Missouri,* Case No. 7-CA-20482, OALJ-83-85 (May 12, 1983). The facts adduced in this case resulted in a holding favoring disclosure of names and addresses. It was held that the exclusive representative involved did not have adequate access to bargaining unit members, and could not effectively communicate with them. The factual situation presented in *Defense Mapping* is clearly distinguishable. However, the

legal issue relative to the necessity of access is nearly identical to the legal issue posed by the language of Section 7114(b)(4)(B) of the Statute. Although counsel representing the General Counsel herein worked diligently to develop a record to establish a finding that the Union did not have adequate access to bargaining unit members, a careful review of the evidence discloses that this burden was not sustained by a preponderance of the evidence.

The Union contended that the names and addresses of bargaining unit members were vitally needed to communicate with individual members to ascertain their problems, and to obtain their views relating to bargaining priorities so that intelligent proposals might be promulgated by the Union.[9] The record revealed no evidence to support a contention that the Union did not have access to the unit for the purposes outlined.

With the exception of a small group of 14 bargaining unit members, all members of the unit were located on three floors of a single office building located at 1520 Market Street in St. Louis. Only about 889 bargaining unit employees were assigned to the three floors which housed the operations of the Respondent. The Union had access to the employees at each of two entrances and two exits to the building, and most of the employees utilized a single main entrance. Since the first three floors housed Respondent's operations, employees assigned to these floors were physically located in a relatively small area for pur-

---

[9] Although these reasons for requesting the names and addresses were advanced by the Union, the record also established that Union acquisition of the list was considered vitally necessary in connection with efforts to recruit new members. The language of Section 7114(b)(4) provides no basis for disclosure of the names and addresses of bargaining members for the purpose of recruiting new union members.

poses of access. In fact, it was the practice of the Union to pass out literature at the entrances, and at other locations within the building. There was no clear showing that such access was ineffective. Respondent's work areas are secured by an identification system, but it was established that Union representatives had access to secured work areas.

The fourteen employees not assigned to the first three floors of the office building address were all located at a separate address in the St. Louis metropolitan area. Here again, the record reflected that the Union had unimpeded access to these employees.

An important element relating to the issue of access is observed in the fact that bargaining unit members worked at desks in an office environment. The names of unit members are regularly disclosed to the Union with information concerning their organizational location. "Desk drops" are authorized by the terms of the collective bargaining agreement, and the Union has in fact utilized this means of access to reach individual bargaining unit members for the purpose of obtaining employee views relating to contract issues.

The record also otherwise disclosed that the Union has had opportunity to reach employees directly for the purpose of soliciting their opinions, and/or to obtain their home addresses. There was no persuasive showing that the number of stewards were inadequate to reach the relatively small number of bargaining unit members located at the two work site locations. Instead, the record established that at least one Union steward position had not been filled by the Union.

Facilities for Union meetings were provided. The Respondent took special steps to adjust worker lunch schedules to permit attendance, and interceded with the General Services Administration on behalf of the Union in

order to obtain Union access to a public address system used at 1520 Market Street, the building housing most of the bargaining unit members. The Union also had access to a 3′ × 4′ bulletin board located on the third floor of the Market Street address, and the Union had access to employees during new employee orientation sessions.

The Union's argument that use of the mails would preclude the Respondent from learning the content of communications to members was seen to be without merit. There would be no guarantee of confidentiality with a mailing to all bargaining unit members in light of the fact that a significant percentage of the unit members do not belong to the Union. In this regard there was no showing of any appreciable difference between depositing sealed envelopes on the desks of unit members; and the much sought after use of the U.S. mail, and/or the use of the Respondent's internal mail system.

Evidence to the effect that Union stewards and officers, and members were unwilling to devote sufficient non-duty time to Union work did not relate to the question of access to employees, nor did it constitute a showing that there was an absence of access in this case. Moreover, there was no indication that less non-duty time would be required of Union officials if names and addresses were made available; and, in light of the existing right to "desk drop," there was no showing that the supplying of names and addresses would appreciably increase available access to bargaining unit members.

The record indicates that the Union did not in fact make effective use of the "desk drop" because Union officers believed that literature left on desks would be discarded. There was no indication that the discard rate would be lessened by a mailing to employees. Similarly, lack of attendance at Union meetings was not probative on the question of existing available access.

In summary, there was no clear showing that the use of "desk drops," direct distributions, meetings, bulletin boards, and direct personal contact were inadequate in the special circumstances presented in this case. That is, in light of the existence of the foregoing, Counsel for the General Counsel did not establish that the list of names and addresses sought was "necessary for a full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining."[10] Accordingly, it is recommended that the Authority issue the following Order pursuant to 5 C.F.R. § 2423.29.

ORDER

IT IS HEREBY ORDERED, that the complaint in Case No. 7-CA-30560, be, and hereby is, dismissed.

/s/ LOUIS SCALZO
LOUIS SCALZO
Administrative Law Judge

Dated: September 24, 1984
Washington, DC

[10] In view of this conclusion it is unnecessary to pass upon Respondent's argument that disclosure in this case would contravene the provisions of the Privacy Act.

APPENDIX H

24 FLRA No. 5

UNITED STATES OF AMERICA BEFORE THE FEDERAL LABOR RELATIONS AUTHORITY WASHINGTON, D.C.

Case No. 7-CA-20482
(19 FLRA No. 85)

DEFENSE MAPPING AGENCY AEROSPACE CENTER, ST. LOUIS, MISSOURI

RESPONDENT

and

NATIONAL FEDERATION OF FEDERAL EMPLOYEES, LOCAL 1827

CHARGING PARTY

DECISION AND ORDER ON REMAND

I. Statement of the Case

This case is before the Authority pursuant to a remand from the United States Court of Appeals for the Eighth Circuit. The question before the Authority is whether it is an unfair labor practice under the Federal Service Labor-Management Relations Statute (the Statute) for the Respondent (Agency) to refuse a request, made pursuant to section 7114(b)(4) of the Statute, to provide the Charging Party (Union) with the names and home addresses of employees in a bargaining unit which the Union exclusively represents.

In a recent Decision and Order on Remand in another case, *Farmers Home Administration Finance Office, St. Louis, Missouri,* 23 FLRA No. 101(1986) (*FHAFO*), we

reviewed the Authority's previous decision concerning the release of the names and home addresses of bargaining unit employees to exclusive representatives. We concluded that the release of the information is not prohibited by law, is necessary for unions to fulfill their duties under the Statute, and meets all of the other requirements established by section 7114(b)(4). We also determined that release of the information is generally required without regard to whether alternative means of communication are available. Consistent with our decision on remand in *FHAFO,* we conclude that Respondent's refusal to provide the Union with the names and home addresses sought in this case violated section 7116(a)(1), (5) and (8) of the Statute. We therefore vacate the Authority's previous decision in this case.

II. Facts

The Union requested the names and home addresses of the unit employees it represented. The Respondent denied the request on the ground that the information was not maintained in a form which was reasonably available. The Respondent also contended that the home addresses in the employees' personnel records were not current, and that to retrieve the specific information from either its personnel records or its computerized payroll system would be unnecessarily costly and time consuming.

III. Administrative Law Judge's Decision

The Judge concluded that the Respondent failed to comply with the requirements of section 7114(b)(4) of the Statute in violation of section 7116(a)(1), (5) and (8) of the Statute when it refused to provide the Union, upon request, with the names and home addresses of all unit employees represented by the exclusive representative. The

Judge found that: (1) the home addresses of unit employees, while not maintained in a discrete list, were available both in employees' personnel files and in the Respondent's data banks; (2) the cost of retrieving this data was not unreasonable; (3) it "seems axiomatic" that a union must be able to communicate effectively with the employees it represents; and (4) the sources of communication available to the Union were neither effective nor reasonable. The Judge concluded that the Respondent must supply the Union with names and home addresses and that the Privacy Act* is not a bar to such disclosure.

IV. Previous Decision of the Authority

In its previous decision in this case, *Defense Mapping Agency Aerospace Center, St. Louis, Missouri,* 19 FLRA No. 85 (1985), the Authority followed the precedent established in the original *FHAFO* case, 19 FLRA No. 21 (1985). The Authority concluded that the release of home addresses was not required pursuant to section 7114(b)(4) of the Statute because the disclosure of such information was "prohibited by law," specifically the Privacy Act. The Union appealed. *National Federation of Federal Employees, Local 1827 v. FLRA,* No. 85-2202 (8th Cir.). The Authority requested that the court remand the case. The Authority also sought remand from the courts in *FHAFO* and two other cases which had been appealed and presented substantially identical issues. The courts granted the Authority's requests in the *FHAFO* case, *American Federation of Government Employees, Local 3354 v. FLRA,* No. 85-1493 (D.C. Cir.) (reviewing 19 FLRA No. 21); in *Philadelphia Metal Trades Council v. FLRA,* No. 85-1625 (D.C. Cir.) (reviewing 19 FLRA No. 107); and in

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* Privacy Act of 1974, 5 U.S.C. § 552a (1982).

this case. The U.S. Court of Appeals for the Second Circuit, however, denied the Authority's remand request in one case, *Social Security Administration, Northeastern Program Service Center,* 19 FLRA No. 108 (1985), and issued a decision. The Second Circuit reversed the Authority's holding that the release of names and home addresses was "prohibited by law," *i.e.,* the Privacy Act, under section 7114(b)(4) of the Statute. *American Federation of Government Employees, Local 1760 v. FLRA,* 786 F.2d 554 (2nd Cir. 1986). The Authority then decided to review the entire issue of the release of employees' names and home addresses and invited agencies, unions and interested persons to submit *amicus* briefs addressing the issue. A number of *amicus* submissions were received. Additionally, the Respondent in this case submitted a supplemental brief subsequent to the Eighth Circuit's remand and the Union filed a response.

V. Positions of the Parties

In its supplemental submission, the Respondent contends that the disclosure of employees' home addresses is not permitted under the "routine use" exception of the Privacy Act, 5 U.S.C. § 552a(b)(3). The Respondent argues that the release of such information is not required by the Office of Personnel Management (OPM) in a notice published by OPM which defines the routine use of personnel records. The Respondent maintains that in determining whether release of data is a routine use, it must be shown that the release does not result in a clearly unwarranted invasion of personal privacy. The Respondent urges the Authority to find, consistent with its prior decision, that the release of home addresses in this case would constitute a clearly unwarranted invasion of personal privacy.

In its response, the Union contends that when a request is made for material contained in an employee's personnel records, the test established by OPM's routine use notice is whether such information is necessary and relevant to the Union's representational duties. The Union further urges the Authority to adopt the view of the Second Circuit in *AFGE Local 1760 v. FLRA*, 786 F.2d 554, that a union's need for home addresses outweighs employees' "modest" privacy interest in that information. Finally, the Union contends that the alternative means of communication available were inadequate, particularly as the Union wanted to convey a confidential message to the employees it represents and all of the alternative means of communication would give management an opportunity to see the Union's messages.

VI. Analysis and Conclusion

As noted above, the Authority in the decision on remand in *FHAFO* concluded that the release of the names and home addresses of bargaining unit employees to the exclusive representative of these employees is not prohibited by law, is necessary for unions to fulfill their duties under the Statute, and meets the other requirements of section 7114(b)(4). We also determined that agencies are required to furnish such information without regard to whether alternative means of communication are available or adequate. Based on our decision on remand in the *FHAFO* case, we find that the Respondent in this case was required to furnish the Union with the names and home addresses of the employees in the bargaining unit. Further in that regard, we find that the names and home addresses of the unit employees are reasonably available to the Respondent and that it would not place an undue burden on the Respondent to provide the Union with the informa-

tion requested. We conclude that the Respondent's refusal to furnish the requested information in this case constituted a violation of section 7116(a)(1), (5) and (8) of the Statute.

ORDER

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute, it is ordered that the Defense Mapping Agency Aerospace Center, St. Louis, Missouri, shall:

1. Cease and desist from:

(a) Refusing to furnish, upon request by the National Federation of Federal Employees, Local 1827, the exclusive representative of its employees, the names and home addresses of all employees in the bargaining unit it represents.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights assured them by the Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Upon request by the National Federation of Federal Employees, Local 1827, the exclusive representative of its employees, furnish it with the names and home addresses of employees in the bargaining unit it represents.

(b) Post at all its facilities where bargaining unit employees represented by the National Federation of Federal Employees, Local 1827 are located, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by a senior official of the Defense Mapping Agency Aerospace Center, St. Louis, Missouri, and shall be posted and maintained for 60 consecutive

days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to section 2423.60 of the Authority's Rules and Regulations, notify the Regional Director, Region VII, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply.

Issued, Washington, D.C., November 13, 1986.

/s/ JERRY L. CALHOUN
Jerry L. Calhoun, Chairman

/s/ HENRY B. FRAZIER III,
Henry B. Frazier III, Member

/s/ JEAN MCKEE
Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

NOTICE TO ALL EMPLOYEES
PURSUANT TO
A DECISION AND ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY
AND IN ORDER TO EFFECTUATE THE POLICIES OF
CHAPTER 71 OF TITLE 5 OF THE
UNITED STATES CODE
FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS
WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT refuse to furnish, upon request by the National Federation of Federal Employees, Local 1827, the exclusive representative of our employees, the names and home addresses of all employees in the bargaining unit it represents.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights assured them by the Federal Service Labor-Management Relations Statute.

WE WILL, upon request by the National Federation of Federal Employees, Local 1827, the exclusive representative of our employees, furnish it with the names and home addresses of all employees in the bargaining unit it represents.

_____
(Activity)

Dated: _____ By: _____
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material. If employees have

any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Region VII, Federal Labor Relations Authority, whose address is: 535 16th Street, Suite 310, Denver, Colorado 80202 and whose telephone number is: (303) 837-5224.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

Case No. 7-CA-20482
(19 FLRA No. 85)

DEFENSE MAPPING AGENCY AEROSPACE CENTER,
ST. LOUIS, MISSOURI

RESPONDENT

and

NATIONAL FEDERATION OF FEDERAL EMPLOYEES,
LOCAL 1827

CHARGING PARTY

CERTIFICATE OF SERVICE

I hereby certify that copies of the Decision and Order on Remand of the Federal Labor Relations Authority in the

subject proceeding have this day been mailed to the following parties:

/s/ EVON H. BUMBRAY
EVON H. BUMBRAY
FLRA Docket Clerk

EDWARD S. BISHOP, JR.
Assistant General Counsel
Defense Mapping Agency Aerospace Center
3200 S. Second Street
St. Louis, MO 63118

STEPHEN GORDON
General Counsel
National Federation of Federal Employees
1016 16th Street, N.W.
Washington, D.C. 20006

MARJORIE THOMPSON
Regional Director, Region VII
Federal Labor Relations Authority
535 16th Street, Suite 310
Denver, CO 80202

ALLAN D. HEUERMAN
Assistant Director for Employee, Labor and Agency Relations
U.S. Office of Personnel Management
Room 7412
1900 E Street, N.W.
Washington, D.C. 20415

Dated: November 13, 1986
Washington, DC

APPENDIX I

19 FLRA No. 85

UNITED STATES OF AMERICA BEFORE THE FEDERAL LABOR RELATIONS AUTHORITY WASHINGTON, D.C.

Case No. 7-CA-20482

DEFENSE MAPPING AGENCY AEROSPACE CENTER, ST. LOUIS, MISSOURI

RESPONDENT

and

NATIONAL FEDERATION OF FEDERAL EMPLOYEES, LOCAL 1827

CHARGING PARTY

DECISION AND ORDER

The Administrative Law Judge issued the attached Decision in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices alleged in the complaint, and recommending that it be ordered to cease and desist therefrom and take certain affirmative action. Thereafter, the Respondent and the General Counsel filed exceptions to the Judge's Decision, and the General Counsel filed an opposition to the Respondent's exceptions.

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute (the Statute), the Authority has reviewed the rulings of the Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon considera-

tion of the Judge's Decision and the entire record,[1] the Authority hereby adopts the Judge's findings, conclusions and recommendations only to the extent consistent herewith.

The Judge concluded that the Respondent failed to comply with the requirements of section 7114(b)(4) of the Statute[2] in violation of section 7116(a)(1), (5) and (8) of the Statute when it refused to provide the Union, upon request, with the names and home addresses of all unit employees represented by the exclusive representative. In this regard, the Judge, *inter alia,* found that: the home addresses of unit employees, while not maintained in a discrete list, were available both in employees' personnel files and in the Respondent's data banks and that the cost of retrieving this data was not unreasonable; that it "seems axomatic" that a union must be able to communicate

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[1] In view of our disposition of this case, the Respondent's post-hearing Motion to Reopen Record for the purpose of presenting further testimony and evidence is hereby denied.

[2] Section 7114(b)(4) of the Statute provides:

§ 7114. Representation rights and duties

* * * * *

(b) The duty of an agency and an exclusive representative to negotiate in good faith under subsection (a) of this section shall include the obligation—

* * * * *

(4) in the case of an agency, to furnish to the exclusive representative involved, or its authorized representative, upon request and, to the extent not prohibited by law, data—

(A) which is normally maintained by the agency in the regular course of business; [and]

(B) which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining[.]

effectively with the employees it represents, and that the sources of communication available to the Union here being neither effective nor reasonable, the Respondent must supply the Union with names and home addresses; and that, based on private sector precedent, the Privacy Act[3] is not a bar to such disclosure.

The Authority disagrees. In a recent decision, *Farmers Home Administration Finance Office, St. Louis, Missouri,* 19 FLRA No. 21 (1985) (hereinafter *Farmers Home Administration*), the Authority, relying on its prior decision in *Army and Air Force Exchange Service (AFFES), Fort Carson, Colorado,* 17 FLRA No. 92 (1985) (hereinafter *AFFES*), stated that the disclosure of unit employees' names and home addresses, like the disclosure of other data sought pursuant to section 7114(b)(4) of the Statute, requires not only a case by case determination as to whether the data has been requested, whether it is normally maintained, whether it is reasonably available, and whether it is necessary to enable the exclusive representative to fulfill its representational obligations, but also requires a determination that the disclosure of the data sought would not be prohibited by law, including the Privacy Act. In *AFFES,* the Authority decided that, in determining whether the disclosure of any data sought pursuant to section 7114(b)(4) of the Statute is or is not otherwise "prohibited by law," *i.e.,* the Privacy Act, it will use the same balancing test applied by the courts in evaluating whether information sought under the Freedom of Information Act (FOIA)[4] should be disclosed or should be protected from disclosure as a clearly unwarranted in-

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[3] Privacy Act of 1974, Pub. L. No. 83-579, 88 Stat. 1896 (codified as amended at 5 U.S.C. § 552a (1982)).

[4] Freedom of Information Act, Pub. L. No. 89-487, 80 Stat. 256 (codified as amended at 5 U.S.C. § 552 (1982)).

vasion of privacy under the FOIA exemption set forth at 5 U.S.C. § 552(b)(6). The application of the (b)(6) balancing test requires weighing the necessity of the data for the union's purposes against the degree of intrusion on the individual's privacy interests caused by disclosure of the data.[5]

Guided particularly by the decision of the Fourth Circuit in *American Federation of Government Employees, AFL-CIO, Local 1923 v. United States Department of Health and Human Services,* 712 F.2d 931 (4th Cir. 1983), wherein the Court adopted the lower court's determination that the balance of all factors led to the conclusion that an exclusive representative was not entitled to the home addresses of unit employees which it had sought pursuant to the FOIA, the Authority in *Farmers Home Administration* applied the foregoing balancing test and concluded that the exclusive representative there was not entitled to the names and home addresses of unit employees under section 7114(b)(4) of the Statute.

As in *Farmers Home Administration,* the Authority finds that the same findings and conclusions flow from the similar facts of the present case. Thus, for the reasons stated in *Farmers Home Administration,* we find that the employees' strong privacy interest in their home addresses outweighs the necessity of the data for the Union's purposes in the circumstances of this case. Moreover, the record in this case clearly establishes that alternative means of communication with unit employees were available to the Union herein.[6] Further, we find that the records sought by the Union herein, as in *Farmers Home*

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[5] The interrelationship of the Privacy Act and the FOIA exemption are set forth more fully in *AAFES.*

[6] In this regard, the Union could have communicated with unit employees, *e.g.,* through the use of bulletin boards; the Respondent's

Administration, i.e., the names and addresses of unit employees, are not of the type that generally must be disclosed pursuant to the FOIA's (b)(6) exemption for the purposes for which they were sought herein. Thus, the Authority finds that the disclosure of unit employees' names and home addresses for the purposes for which they were sought herein was "prohibited by law" and that their release by the Respondent therefore was not required pursuant to section 7114(b)(4) of the Statute. Therefore, the Authority concludes that the Respondent did not fail to comply with section 7114(b)(4) of the Statute in violation of section 7116(a)(1), (5) or (8) of the Statute when it refused to provide the exclusive representative with the names and home addresses of unit employees.[7] Accordingly, the Authority shall order that the complaint be dismissed.

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bulletins and newspaper; meeting space during non-duty hours; Union newspapers distributed in non-security areas; semi-annual membership drives; and a network of Union officers and stewards with access to employees in non-security areas. The extent to which some of these means of communication were subject to restrictions, such as the Union's obligation to submit advance requests, does not in our opinion detract from our finding that the Union had alternative means of communication available, especially as we note the long bargaining history of the parties, including matters with regard to means of communication.

[7] In so concluding, the Authority does not reach the question of whether the data sought herein meets the other requirements of section 7114(b)(4) of the Statute.

ORDER

IT IS ORDERED that the complaint in Case No. 7-CA-20482 be, and it hereby is, dismissed in its entirety.

Issued, Washington, D.C., August 12, 1985

/s/ HENRY B. FRAZIER III,
Henry B. Frazier III, Acting Chairman

/s/ WILLIAM J. MCGINNIS, JR.
William J. McGinnis, Jr., Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, DC 20424

Case No. 7-CA-20482

DEFENSE MAPPING AGENCY AEROSPACE CENTER,
ST. LOUIS, MISSOURI

RESPONDENT

and

NATIONAL FEDERATION OF FEDERAL EMPLOYEES,
LOCAL 1827

CHARGING PARTY

LOUIS P. EAVES,
Representative for Respondent

NICHOLAS J. LOBURGIO and
JOSEPH SWERDZEWSKI,
Attorneys for the General Counsel
Federal Labor Relations Authority

Before: ISABELLE R. CAPPELLO Administrative Law Judge

DECISION

This is a proceeding under Title VII of the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1192, 5 U.S.C. §§ 7101 *et seq.* (Supp. V, 1981), commonly known as the Federal Service Labor-Management Relations Statute, and hereinafter referred to as the "Statute", and the rules and regulations issued thereunder and published at 5 CFR §§ 2411 *et seq.*

Pursuant to a charge filed on September 27, 1982, by the Charging Party, the Acting Regional Director of Region 7 of the Federal Labor Relations Authority (hereinafter, the "Authority") investigated and, on November 10, 1982, filed the complaint initiating this proceeding.

The complaint alleges that on or about July 23 and August 4, 1982, the Charging Party requested that Respondent furnish to it the names and addresses of all present bargaining unit employees; that on or about July 29 and August 5, 1982, Respondent failed or refused, and continues to refuse to provide the requested information; that the Charging Party is entitled to such information under the provisions of 5 U.S.C. § 7114(b)(4); and therefore Respondent has engaged in unfair labor practices within the meaning of 5 U.S.C. §§ 7116(a)(1), (5), and (8).[1]

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[1] The pertinent statutory provisions are as follows.

5 U.S.C. § 7114(b) provides that [t]he duty of an agency and an exclusive representative to negotiate in good faith . . . shall include the obligation— . . .

> (4) in the case of an agency, to furnish to the exclusive representative involved, or its authorized representative, upon request and, to the extent not prohibited by law, data—
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> > (A) which is normally maintained by the agency in the regular course of business;
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> > (B) which is reasonably available and necessary for full and proper discussion, understanding and negotiation of subjects within the scope of collective bargaining; and
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> > (C) which does not constitute, guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining; . . . .

5 U.S.C. § 7116(a) provides that, "it shall be an unfair labor practice for an agency—

> (1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter; . . .

Respondent alleges that it routinely provides the Charging Party with the names of bargaining unit employees, and has only refused to provide the home addresses of such employees. It denies that such a refusal violates the Statute.

A hearing on the matter was held in St. Louis, Missouri, on January 12, 1983. The parties appeared, adduced evidence, and examined witnesses. Briefs were filed by the General Counsel on March 11, 1983, and by the Respondent on March 8, 1983, pursuant to an order extending the briefing time, for good cause shown, to March 11, 1983. Based upon the record, my observation of the demeanor of the witnesses, and the briefs, I make the following findings of fact, conclusions of law, and recommended order.

Findings of Fact[2]

1. It is admitted that Respondent is an "agency" and the Charging Party is a "labor organization", within the mean-

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(5) to refuse to consult or negotiate in good faith with a labor organization as required by this chapter; . . . [or]

(8) to otherwise fail or refuse to comply with any provision of this chapter.

[2] The following abbreviations will be used herein. "Tr" refers to the transcript. "GC" refers to the exhibits of the General Counsel, and "R" refers to those of Respondent. "GCBr" refers to the brief of the General Counsel and "RBr" to that of Respondent. Multipage exhibits and the briefs will be designated by page or paragraph number following the exhibit or brief designation.

The transcript is corrected pursuant to unopposed motions filed by the parties. The corrections are set forth in Appendix A to this decision.

Unless otherwise noted, all dates refer to events which took place in 1982.

ing of the Statute, and that since September 9, 1976, the Charging Party has been recognized as the exclusive representative of all general schedule and wage grade employees of Respondent, with certain exceptions not here relevant. See GC 1(b) and (c), pars. 2 and 3.

2. Respondent maintains two facilities—one at 2nd and Arsenal Street and one at South Broadway. They are about 4½ or 6 miles apart. A bus service is provided between them. Respondent employs a total of approximately 3,900 employees at its two facilities. Of the 3,900, approximately 1,300 are bargaining unit employees. A "great majority" perhaps two-thirds, of the unit employees are employed in the main building at 2nd and Arsenal (TR 62 and see also TR 95). In all, there are some 12 or 13 buildings at 2nd and Arsenal, with multiple exits. Exits from 2nd and Arsenal flow into the Anheuser-Busch brewery. At South Broadway, there are four major buildings, with multiple exits. There are two parking lots at South Broadway, and six or eight at 2nd and Arsenal, with more parking around the docks and at the roadways. Within the main building at 2nd and Arsenal there is a secured wing, some four or five stories high, which has controlled access. At the time the Union made its request for the names and addresses of unit employees, neither its President nor its Chief Steward were cleared for access to the secured areas.

Employees live over a 100-mile radius of St. Louis and in two States—Illinois and Missouri. Maintenance employees, who are in the bargaining unit, sometimes work off the site of the two facilities, in barracks located a "considerable" distance away, perhaps 8 miles (TR 109-110).

3. It is admitted that since approximately 1980, Respondent has provided the Charging Party (also referred to

hereinafter as the "Union") with a listing of the names of bargaining unit employees, on a recurring basis.

4. On July 23 the Union, by letter, requested that Respondent provide it with "a complete listing of bargaining unit members names and addresses" (GC 3). The letter stated that the request was made "[i]n order for the Union to communicate with bargaining unit members."

5. The Union never told Respondent what, in particular, it wished to communicate to employees; and Respondent never asked.

6. The particular communication which the Union wished to make was revealed at the hearing and, to the surprise of Respondent, it involved a Secrecy Agreement.

7. The Secrecy Agreement was introduced into evidence as Respondent's Exhibit No. 16. It states that the employee has read and understand the Espionage Act and is familiar with its penalties. Twelve paragraphs of that criminal statute are excerpted on the back of the Agreement. The employee has to agree never to "divulge, publish, or reveal, either by word, conduct, or by any other means, any classified information, intelligence, or knowledge, except in the performance of [his or her] official duties and in accordance with the laws of the United States, unless specifically authorized in writing in each use by the Secretary of Defense" (R 16.1). The employee has to agree that the Agreement will be binding even after termination of Government service. The Agreement was developed at the headquarters of the Defense Mapping Agency, in Washington, D.C. (hereinafter, "Hq DMA").

8.Respondent, by letter, furnished the Union a copy of the Secrecy Agreement on May 26, along with a proposed cover letter which indicated that Hq DMA was requiring "all DMACC [the acronym for Respondent] employees, currently cleared for access to classified infor-

mation" to execute the Agreement, and that supervisors were to witness the signature (R 17). Respondent's letter to the Union indicated that the Agreement and proposed cover letter were "forwarded for coordination pursuant to Article 11 of the Labor-Management Agreement" (R 15). Article 11 gives the Union 14 calendar days to request negotiations over proposed changes. Failure of the Union to respond within that time frame allows Respondent to implement the proposed changes without bargaining, under the collective bargaining agreement.

By July 8, the Union had not responded to Respondent's May 26 letter forwarding the Agreement and the proposed cover letter. So Respondent began distribution to employees in "mid July" (TR 200). But distribution was under a different cover letter than the one which had been furnished to the Union. At least one difference was that the cover letter distributing the Agreement advised "employees to complete the Secrecy Agreement by . . . 30th of September" (TR 200) (The cover letter actually sent to employees was not adduced as an exhibit).

9. The union President was under the impression that the Agreement was "just for top secret people." But then he began to receive complaints and inquiries from unit employees, asking for guidance on how to respond, whether it was mandatory for them to sign it, and what was the Union position on the matter. Thus, the Union came to the realization that there was a need to negotiate over the matter. "[S]ometime right around July 23, Respondent's Labor Relations Officer indicated a "willingness to negotiate on it if [the Union] would give him some kind of proposal so he could make it" (TR 86 and see also TR 71, 105, and 117). The Union made its first proposal to bargain over the matter on August 13 and, in the letter of that date to Respondent, stated that it would

"submit proposal at the table" (TR 18). The letter requested that bargaining start on August 23 and that the Union be briefed on the Agreement prior to the start of negotiations.

10. To prepare for negotiations, the Union needed some information, including the number of employees actually involved in classified information, and whether the Agreement was a directive from higher authority than Respondent. It also needed advice from its National Office as to the appropriate bargaining level. The Agreement mentioned that it was replacing another form; and so the Union wanted to find the previous form.

The current contract between the parties defines "representational functions" of the Union to include "[p]reparation for and participation in bargaining" (R 1.27, par. 10-5b).

11. The Union wanted to communciate with unit employees to advise them "to stall" signing the Agreement, "if they could," until negotiations were completed and, if forced to sign it, to note that it was being signed under protest and duress (TR 86 and see also TR 73, 76, and 103-104). There was talk of insubordination; and the Union wanted to explain to the unit employees what insubordination was. The Union also wanted to be sure that employees had read the Espionage Act and knew what their rights were. The Union felt the need to communicate by letter so that management would not know what it was telling employees and take steps to force their signing. It also wanted to advise all the unit employees the same thing at the same time (TR 74).

12. On July 29, Respondent responded to the July 23 request by the Union for the complete listing of unit employees' names and addresses. The response was that

"[s]uch information [the addresses] is not maintained by DMAAC in a form which is reasonably available" (GC 4).

13. On August 4, the union Chief Steward replied, by letter, to Respondent's July 29 letter. The Union claimed a right to the names and addresses of bargaining unit members; stated that "[s]uch information is necessary for the Union to communciate vital information to such members in a timely fashion;" and expressed the "hope it w[ould] not be necessary to resort to a third party to exercise this right, for such is necessary for Union to discharge its obligation under the statute" (GC 5).

14. On August 5, Respondent replied by letter to the Union's August 4 letter by simply reiterating its prior position, namely that the information was not maintained in a "reasonably available" form. See finding 12, *supra.* As of August 5, Respondent had apparently not inquired of its Information Systems staff as to the actual availability of such information or the cost of obtaining it. See TR 180-181 and 223-224.

15. Two collective bargaining agreements have been in effect between Respondent and the Union. One was effective 1977. The other became effective February 19, 1982. Neither explicitly provides that Respondent furnish home addresses of employees.

16. The Union maintains the home addresses of dues-paying members, who approximate 343 in number. See R 3.6.

17. The collective bargaining agreement in effect since February 19, 1982 provides, under Article 13, the following means whereby the Union can communicate with unit employees.

a. Use of bulletin boards. These boards are dispersed throughout the locations where unit employees work and go to lunch. Whether there are bulletin boards in secured areas was not established. See TR 109.

b. Use of Respondent's internal mail system, the stated intent being "to provide an economical and time efficient way for communication between the Union and individual unit employees and the Employer" (R 1.42, pars. 13-5d). It may not be used for "bulk distribution" or for "internal Union business" (R 1.42, pars. 13-5a and d). One of Respondent's witnesses testified that the "permissible" use was "to maintain communication between the Union and the Employer as regards their representation" (TR 159-160). In the past, Respondent has stopped the Union from mailing out information to all employees, on the ground that it was considered "bulk mail" (TR 90).

c. Use of Respondent's Administrative Bulletin and Orientor. Material must be submitted 14 days prior to the proposed date of publication. Publication is dependent on availability of space. Material may not deal with such matters as "grievances, unfair labor practices, complaints and organizational drives" (R 1.42, par. 13-6a). The Bulletin is published twice a week. The Orientor is published every two weeks.

d. Use of two stations at 2nd Street and one at South Broadway for the distribution of a union newspaper. See R 1.43, par. 13-7.

e. Use of meeting space during non-duty hours of unit employees. Such use must be requested at least 14 calendar days in advance. See R 1.43, par. 13-8. Such meetings are held monthly and are attended mostly by union members.

f. Use of an office with a private telephone paid for by the Union. The office is at the main building at its 2nd and Arsenal facility. See TR 60. The contact also provides for an office at the South Broadway location. See R 1.40, par. 13-1. Employees may visit the office on official time.

18. The Union has two officers, President and Chief Steward, who spend all their time on official time. Five

other Union officials and 22 stewards are authorized to use an additional 2,000 hours of official time. See TR 60 and 63. The stewards are dispersed throughout the work areas of unit employees, but not at the time the requests for home addresses were made by the Union, in July and August. At that time, the Union had "made one request [for access to security areas] and it was denied" (TR 108).

19. In the course of a day, union officials have 9 or 10 contracts with unit members. Basically, the contacts are with the same members, day after day. On a weekly basis, the Chief Steward has contact with "[m]aybe 15" (TR 79).

20. Membership drives are conducted twice a year by the Union and, under the contract may be conducted over the course of 15 workdays. Tables are set up in heavy traffic areas where a lot of employees pass back and forth, and are manned "to tr[y] to catch breaks" (TR 65 (a)). Such drives must be conducted in non-work areas during non-duty hours. Requests for equipment and facilities must be made to Respondent at least 10 days in advance.

21. The Union has never utilized any of the means available to it to compile a list of home addresses for unit employees.

22. In his testimony, the union President established what he deems to be the impracticabilities of compiling home addresses by means available to the Union. The use of bulletin boards is not effective because, in his opinion, employees do not invariably read them and would provide Respondent with the Union's bargaining position. The union President and its Chief Steward did not have access to the boards in secured areas, at the time of the July and August requests for addresses. Respondent does not allow the Union to use the internal mail system for bulk mailing or internal Union mail such as a Union letter to all employees. Use of Respondent's administrative bulletin

and internal newspaper by the Union are subject to conditions such as the Respondent's editorial control, space being available, and advance submission of proposed articles at least two weeks prior to publication date. The Union's own newspaper can be distributed at two locations on Respondent's facilities, but its dissemination cannot be controlled to limit that distribution only to unit employees. The Union newspaper is only mailed to members. The Union can use Respondent's facilities during non-duty hours for Union meetings, but must again make a request for use of the space at least two weeks in advance.

Individual telephone contacts with unit employees, either to obtain the requested data or in lieu of a letter to the employees, would have resulted in either a disruption of Respondent's mission, if done during duty hours, or would have required the Union to gather over 900 telephone numbers from numerous directories in two different States, so that it could contact the unit employees after work at their homes.

The steward system in place in August 1982 was down 17 or 18 such officials; and they did not cover every organizational unit on all shifts in every building. Access to security areas where employees worked was very limited. Attempts to individually contact each unit employee by handbilling was not an effective or efficient means to reach them because unit employees are not identifiable by badge or uniform, and because of the long time span needed to distribute them due to flexible workhours. The Union's last attempt at handbilling was not successful. See TR 81-92. Finally, the Union wanted to send a letter because it wanted the communication to be fast; and it wanted to tell all of the unit employees the same thing.

23. In March 1980, the parties entered into a memorandum of understanding concerning ground rules for the

then upcoming negotiations on their current collective bargaining agreement. It included specific provisions that all proposals be submitted in writing, although, in practice, this provision was not always followed. Pursuant to this requirement, the Union submitted to Respondent a written article entitled "Orientation of New Employees." General bargaining began in September 1980 and continued through January 1982. Bargaining over the Union's "Orientation of New Employees" proposal occurred on September 29, 1980.

The Assistant Chief Negotiator for the Union, Louis Foster, testified that while the parties were discussing the orientation of new employees, specifically Union attendance at new employee orientation meetings, the lack of supervisory orientation for new employees, and the introduction of new employees to the applicable Union steward, he asked whether the Union could get the home addresses of these new employees so that it could contact them about the Union's goals, objectives and achievements. The union's Chief Negotiator, Virgil Haun, confirmed that the subject of bargaining was new employees and that Mr. Foster asked for the addresses of only new employees. Mr. Haun specifically denied that the bargaining involved any discussion about the names and addresses of all unit employees. The testimony of these two union officials is supported by the Union's bargaining notes. See GC 12. Their recollection was so positive because Mr. Haun, after the bargaining session on new employees, chastised Mr. Foster for interjecting the subject of addresses into the union's proposal.

Respondent's sole witness on this bargaining history issue was Employee Relations Specialist, Donna McGlynn, who was employed by Respondent in August 1980, just prior to the beginning of negotiations in which

she participated. Her testimony on the bargaining session concerning "Orientation of New Employees" was primarily based upon management's bargaining notes. At the hearing, she characterized these notes, which she prepared at an unspecified time, as "very scanty," not "verbatim," and not "all-encompassing;" instead they were digests of lengthy discussions that caught the "intent" of what was discussed (TR 136). Her notes do not reflect that the union made a request for names and addresses of "all" unit employees (TR 149). She, however, recalled that the Union asked for the addresses of all unit employees, based upon a "lengthy discussion" that occurred to which her notes make no reference (TR 149). She admitted to having no independent recollection of the October 8, 1980, bargaining session when the article on orientation of new employees was signed and to difficulty in testifying about events that happened 2½ years ago.

Of these three witnesses, Mr. Foster and Mr. Haun seemed to be surer of their facts than Ms. McGlynn. Also their testimony is supported by the Union's bargaining notes. Accordingly, I credit their testimony over that of Ms. McGlynn as to bargaining over addresses, and find that the 1980 bargaining was limited to addresses for new employees.[3]

24. Article 14 of the current collective bargaining agreement is the only article specifically dealing with information to the union. See R 1.43. There was no discussion about providing addresses to employees during the negotiations over that article. There was a lot of discussion

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[3] In view of this finding, there is no need to address further the argument of Respondent that the Union waived its right to have addresses of all unit employees because it bargained over the matter, and lost, during negotiations over the current collective bargaining agreement.

about when Respondent would honor a request for information, with Respondent taking the position that it would honor "specific request for information relating to a specific situation" but not "generalized requests for a lot of information which were not directed or were not necessarily based on a specific situation or circumstance at the time" (R 133). This is not spelled out in the Article. The Article does require Respondent "to furnish cost free to the Union within thirty (30) calendar days of a specific written request from the Union, all information, data or material, relevant and necessary for the proper discharge of its obligations under Public Law 95-454 and this Agreement" (R 1.43, par. 14-1). This includes access to OPFs (official personnel files) "in accordance with applicable law and this Agreement" (R 1.43, par. 14-1a). This Article was approved by the Department of Defense on February 10, 1982.

25. On April 22, 1981, the Union had made a prior request for addresses of unit employees. On April 28, 1981, Respondent denied the request, and referred the Union to Department of Defense ("DOD") Directive 1426.1, dated October 9, 1974, which specifically states that the home addresses of DOD employees will not be furnished to labor organizations. See TR 129-130 and R 8.A33, par. C-4. DOD Civilian Personnel Manual 1400.25M, effective on November 10, 1981, continued to policy of not releasing home addresses. See TR 131, 1981 (TR 131-132). These DOD directives were issued prior to the current collective bargaining agreement between the parties, which DOD approved, and which recognizes Respondent's obligations under the Statute. See finding 24, *supra*. The Union made no "response" to this denial (TR 131-132).

26. Respondent's Personnel Office maintains addresses of employees in their OPFs. They are not necessarily up to

date. There is no way to verify the accuracy of the home address in the OPF, to the knowledge of Respondent's Supervisory Personnel Systems Manager. To furnish the addresses from the OPFs of the 1,300 bargaining unit employees, a list of unit employees would have to be secured; their folders pulled from two "power files;" their addresses handwritten; and the OPFs then refiled (TR 168-170). The cost of this procedure was apparently not estimated by Respondent. In any event, its cost is not a matter of record.

27. The names and addresses of all employees are also maintained in Respondent's payroll computer system. Two programs exist for utilizing this information—the check-mailing program and the W-2 mailing program. There is no program which would produce just the names and addresses of employees. To establish such a program, an existing one could be modified, or a new one developed. In an estimated 40 man-hours, a program could be prepared to provide the names and addresses of unit employees. According to Respondent's Information Systems' Branch Chief, the one-time cost would be $736, taking into consideration labor costs and the time of the computer and the keypunching. The cost for each run thereafter would be an estimated $21, for 1,500 employees. This cost estimate was first prepared, on October 26, on the basis of a phone call, a few days earlier, from Respondent's Labor Relations Officer.

The primary cost factor, in the $736 figure, is the cost for a GS-12 programmer. Use of a lower-graded employee would not be as "efficient" a way to get the job done (TR 190). This price estimate does not take into account "cannibalizing" existing programs; the priority that the retrieval program had for computer time; the type retrieval, copying or printing; or the retrieval of the names

and addresses of all employees, rather than just unit employees. See TR 181, 185-186 and 189-190. The retrieval for all employees would reduce the cost to "maybe $700" (TR 184).

There is another program in existence which could be "cannibalized" to pull off information of names and addresses of employees (TR 181-183). But it does not conform to "standards" (TR 187). It could be done "on a crash basis" and then corrected so that it conformed to "standards" (TR 187). One of Respondent's "most experienced" programmers (TR 190), Dorothy Hyduke, established that an existing program requested by another user (to supply mailing address for carpooling purposes) could be used to develop a list of names and addresses of employees, "[w]ith certain changes," at a cost of around $300 (TR 225). Such a list would not distinguish between unit and non-unit employees. Programing to retrieve information solely as to unit employees would apparently be around $36. See TR 178 and 184.

28. On October 23, the Union filed a charge against Respondent for failure to bargain over the implementation of the Secrecy Agreement. On November 9, the Authority approved its withdrawal. It is conceded by both parties that they did meet and discuss the Secrecy Agreement. See TR 41, 67, 71-72, 117, and 199-200. The Union prepared some proposals which were presented and responded to by Respondent. Respondent decided that the Secrecy Agreement was not negotiable. See TR 198-199. This decision was reached after the Union's August 13 letter requesting negotiations.

29. Currently, the Authority has in its hands a petition to determine the negotiability of the content of the Secrecy Agreement. In its brief, Respondent supplied the date of the petition (September 22) and the number (O-NG-747). See RBr 5.

30. The collective bargaining agreement between the parties, which is currently in effect, was submitted to the Department of Defense for prior approval. The Department of Defense approved it, on February 10, 1982. Respondent and the Charging Party signed it on February 19, 1982. See the first and last page of Respondent's Exhibit 1.

Discussion and Conclusions

The General Counsel has demonstrated, by a preponderance of the evidence,[4] that Respondent has engaged in the unfair labor practices alleged in the complaint.

The act constituting the statutory violations is the refusal of Respondent to provide the home addresses of bargaining unit employees on the ground, initially, that the addresses were not "reasonably available." See findings 12 and 14, *supra*. The facts show that the addresses are "available," in the personnel files of employees, and in Respondent's computer data bank; but furnishing them would require Respondent to pull the personnel files and hand record the addresses, with no guarantee of their currency, or develop a program for its computer at a cost that could go as high as $736. See finding 26 and 27, *supra*.

Section 7114(b)(4) of the Statute, quoted fully in footnote 1, *supra*, provides that "data" must be "furnished" by an agency to an exclusive representative of its employees, as a part of its "duty . . . to bargain in good faith," and "to the extent not prohibited by law," if it is "data:" that is (A) "normally maintained by the agency in the regular course of business;" (B) "is "reasonably available and necesssary for full and proper discussion, understanding and negotiation of subjects within the scope of collective bargaining;" and (C) "does not constitute, guidance, advice, and

[4] This is the statutory burden of proof. See 5 U.S.C. § 7118(a)(7).

counsel, or training. . . ." In this case, no issue has been raised to subpart (C). See GC (b), par. 7(d) and GC (c), par. 7(d). With this exception, all the other quoted portions of Sections 7114(b)(4) are at issue and will be discussed, *infra*, along with the defenses now raised by Respondent, in its brief.

1. Home addresses of employees constitute "data," within the statutory meaning.

The term "data" is not defined in the Statute. It has been used interchangeably with the word "information," which is a synonym for "data." See page 684 of *The Random House College Dictionary* and *Veterans Administration Regional Office, Denver, Colorado*, 7 FLRA No. 100, 7 FLRA 629, 637 (1982), treating as "data" the names of employees, and 10 FLRA No. 78, 10 FLRA 453, 465, treating as "data" the counselling record of a grievant. Respondent raises no serious argument that home addresses of employees do not constitute "data," but only that the addresses are not kept in a particular format. The Authority has ruled that an agency need not produce "non-existent data." See *Division of Military and Naval Affairs, State of New York, Albany, New York*, 8 FLRA No. 71, 8 FLRA 307 at 320 (1982). But the data here does exist. And, as was held in *N.L.R.B.* v. *General Electric*, 418 F.2d 736, 753 (C.A. 2, 1969), *cert. den.* 397 U.S. 965 (1970) the fact that data does not exist in a particular format is an invalid defense to a refusal to provide information when the data exists in some form and could have been furnished in that form, or at least used to advise the union that it did exist in some form.[5]

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[5] *General Electric* is a case which arose under the National Labor Relations Act ("NLRA") which has no express provision for providing data to labor organization. Nevertheless, the courts have found that an employer has a general obligation to provide information that is

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2. Home addresses of employees are "normally maintained by [Respondent] in the regular course of business."

The record establishes that home addresses are maintained by Respondent in the personnel files of its employees, and in its computer data bank, for a variety of business-related purposes, such as payroll and tax withholdings. See findings 26 and 27, *supra*.

3. The home addresses of bargaining-unit employees are "reasonably available."

The current home addresses are undisputably "available" in Respondent's computer data bank. See finding 27, *supra*. Storage in the computer data bank was obviously a management choice based upon efficient retrieval for a variety, of business-related purposes. Retrieval, of course, depends upon programs; but the fact that Respondent must develop a program to retrieve home addresses of bargaining-unit employees should not be used as an excuse to deny necessary information to its employees' exclusive bargaining representative. Respondent developed a program for another "user," to retrieve home addresses for purposes of carpooling. See finding 27, *supra*. It is not unreasonable for it to do the same for the exclusive bargaining representative of its employees, in order that the representative may intelligently represent them.

Respondent argues unreasonableness, as to retrieval from the computer data bank, on the ground that it would require approximately 40 manhours to establish a program for retrieval of the addresses of unit employees, at a cost of approximately $736 and a cost of $21, thereafter, for

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needed by a union for the proper performance of its representational duties. Such cases are therefore instructional.

each computer run. See RBr 12 and 19.[6] Respondent further argues that it is "self-evident" that it had no business use for such information and would thus derive no benefit from the expenditure of such sums (RBr 12).

As to the "self-evident" statement, it is observed that private-sector employees with "serious labor relations problems" have used the mails to communicate with unit employees. See the *United Aircraft* v. *N.L.R.B.*, 434 F.2d 1198 at 1202 (C.A. 2, 1970) *cert. den.* 401 U.S. 993 (1971). Government agencies might also have some use for an up-to-date list of home addresses of unit employees.

As to the costs, Respondent acknowledges that the Authority's decision in *Veterans Administration Regional Office, Denver, Colorado*, 10 FLRA No. 78, 10 FLRA 453, 456-457 (1982), establishes that data must be furnished without charge to the exclusive representative, under the Statute. Its collective bargaining agreement with the Union also so provides. See finding 24, *supra*. Nevertheless, Respondent argues that "the cost to an agency in providing requested information should be a heavily weighted factor in determining if information is reasonably available" (RBr 19).

Respondent's logic is appealing. If costs were truly astronomic, it might even be persuasive. But here the probable costs are not so high as to defy the mandate of the Statute that its provisions be "interpreted in a manner consistent with the requirement of an effective and efficient Government." See 5 U.S.C. 7101(b), which Respondent cites in support of its position. Throughout Government, agencies are installing computer systems because they are the most effective and efficient way to conduct all

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[6] The $736 figure appears to be an inflated one. See finding 27, *supra*. For around half that sum, it appears that an adequate program could be developed.

manner of Government business. The costs of programing them is obviously taken into account. An agency which chooses to put necessary data into its computer bank, rather than into a file drawer which could be reached without costly programing, should not be able to frustrate legitimate needs of its employees' exclusive bargaining representative on the ground of a programing cost of $736 or less. To allow this would be contrary to the finding of Congress that collective bargaining through labor organizations "safeguards the public interest," "contributes to the effective conduct of public business" and is "in the public interest" (5 U.S.C. 7101(a)).

Home addresses are also available in Respondent's personnel office, where they repose in the personnel folder of each employee. The cost of retrieving addresses from this source was not estimated. The effort involved was not shown to be unduly burdensome, however, See finding 26, *supra*. The fact that the addresses may not all be up to date does not mean that this is not a "reasonably available form," as Respondent argues. See RBr 12. It is common knowledge that first-claim mail is forwarded by the U.S. Postal Service, or returned to sender. It would not be an undue burden for the Union to ascertain the addresses for employees whose mail has been returned, under such circumstances.

4. The home addresses of bargaining-unit employees are "necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining."

It seems axiomatic that a labor organization, to frame intelligent collective bargaining proposals, must be able to communicate effectively with the employees in the unit – to obtain their views on bargaining priorities; to learn their problems; and obtain information, to name a few reasons. When a low percentage of unit employees are members of

the union, the availability of adequate communication channels takes on an added significance, for the membership may not represent a fair sample of the views and problems of the entire bargaining unit on a particular topic. Here, only about 343 of the 1,300 employees in the bargaining unit are members of the Union. See findings 2 and 16, *supra*. In the private sector, just such considerations have been noted in decisions which have declared that it was an unfair labor practice for an employer to withhold home addresses from the exclusive representative of its employees. See *United Aircraft, supra*, 434 F.2d at 1205 and *Prudential Insurance Company of American* v. *N.L.R.B.*, 412 F.2d 77, 83 (C.A. 2, 1969), *cert. den.* 396 U.S. 928 (1969).[7] A union has a statutory-imposed duty to represent and bargain for *all* employees in the unit, not just those who happen to be members. See 5 U.S.C. § 7114(a)(1). Effective communication with *all* unit employees is therefore vital.

Also, the Authority has indicated, most recently in *Veterans Administration Regional Office, Denver, Colorado*, 10 FLRA No. 78, 10 FLRA 453 (1982) that data requested under Section 7114(b)(4) must be furnished not only when necessary to the Union's collective-bargaining duties but, more generally, "to enable the Union to effectively carryout its representational obligations in the processing of an employee grievance" (10 FLRA at 455).

A union's "representational obligations" are multifaceted. Under the contract between the parties here, representational functions of the Union expressly include preparation for bargaining. See finding 10, *supra*. Implicitly, they also include advising unit employees that negotiations are underway and how to protect themselves

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[7] See footnote 5, *supra*, on the instructural nature of cases arising under the NLRA, as these two did.

in the event that an agency acts in a manner adverse to their interests, before bargaining is complete. Such advice is what the union here wished to impart to all unit employees. See finding 11, *supra*. And it was vital advice, for the Secrecy Agreement, presented to unit employees before bargaining was undertaken,[8] precluded employees from ever releasing information about their work, under threat of criminal prosecution. Also, a union letter to all unit employees would have permitted feedback from the employees as to the number and types of employees actually involved in classified work, so that the necessity for unit-wide compliance with the Secrecy Agreement could be challenged, and as to whether they had ever executed such an agreement, in the past. See finding 10, *supra*. Such a letter would have provided the Union with the opportunity, through a timely and confidential medium, to focus internal-unit debate over the Secrecy Agreement, instead of relying upon the haphazard verbal feedback it was receiving.

On this point, Respondent argues that the request for addresses was unrelated to collective bargaining. See RBr 5-8 and 16-19. The facts are otherwise. The Union was preparing for negotiations when the requests were made.[9] See findings 9 and 10, *supra*.

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[8] It should be made clear that Respondent was acting within its rights in distributing the Secrecy Agreement to the employees before bargaining began, because Respondent had been led to believe that the Union was not interested in bargaining about it. See finding 8, *supra*. The only unfair aspect of Respondent's distributing the Agreement when it did was the fact that the Union had never been shown the actual cover letter sent to the employees with the Agreement.

[9] In view of this factual difference, Respondent's reliance upon *Division of Military and Naval Affairs, State of New York, Albany, New York*, 8 FLRA No. 71, 8 FLRA 307 (1982) is inapposite. See RBr 17.

Respondent also makes a point that the Union never told it that the information was needed in connection with the Secrecy Agreement. See RBr 6. In view of Respondent's response, that it was denying the data on the ground that it was not maintained in a "reasonably available form" (see findings 12 and 14, *supra*), the failure of the Union to explain why it needed the information is understandable. But it is also irrelevant. The Statute nowhere requires a union to state precisely why it wants the data; rather it sets forth the requirements which, if met, entitle it to the data. If the agency wants specificity, it may ask. But an agency acts at its peril if, as Respondent has done, it denies the request on the ground of availability, and never inquires further into the needs of the union for the requested data.

At pages 16-17 of its brief, Respondent relies on *Internal Revenue Service, Buffalo District, Buffalo, New York*, 7 FLRA No. 102, 7 FLRA 654 (1982), where the Authority dismissed a complaint alleging a violation for refusal to furnish a case file and assorted history sheets in connection with a grievance of a revenue officer. The basis for the denial was that the grievance itself was so "vague and ill-defined" that the Authority could not itself determine the necessity of the information sought, even after a hearing. See 6 FLRA at 662-663. (The grievance requested that management recognize the grievant's dignity, cease its disparaging remarks to him, and desist from changing work policies and practices re cases being worked on by the grievant. See fn. 7 at 7 FLRA 659). In that case, Internal Revenue requested clarification and stated that "if the grievance was clarified, the request would be considered anew" (7 FLRA at 661). Here Respondent never asked for clarification; it simply informed the Union that the information was not reasonably available.

Respondent also relies upon *Director of Administration, Headquarters, U.S. Air Force*, 6 FLRA No. 24 (1981), where the Authority dismissed a complaint alleging a violation based on the agency's refusal to furnish information concerning "contracts for services which have been let or which may impact upon bargaining unit employees," in connection with a provision of the union's collective bargaining agreement with the agency that: "Contractor personnel will be used to replace civilian personnel only when it is more economical to do so" (6 FLRA at 110-111). It was not shown that any employee had been displaced, reassigned, subjected to reduction in force, or otherwise adversely affected; and no grievances were pending as a result of a contracting-out action. Thus, the Authority could not find any necessity for the information. The agency, unlike Respondent here, made a "good faith attempt to clarify the request" and "was met with a stubborn insistence on entitlement without explanation" (6 FLRA at 125). Here, it is Respondent who displayed stubbornness, denying the Union's request on the sole ground of non-availability of the information and making no attempt to clarify the need for the request. While the Union would probably not have revealed to Respondent exactly what it wanted to tell employees (see finding 11, *supra*), there is no evidence to indicate that, if asked by Respondent, the Union would not have given some clarification of its need to pass on vital information to unit employees.

5. Other sources of communication with unit employees are not effective or reasonable, particularly for getting out messages within a short time frame, as here. The Union in this case needed to get word to unit employees to stall signing the Secrecy Agreements, "if they could," until negotiations were concluded, or to indicate

that they were signing under protest or duress.[10] See finding 11, *supra*.

The Authority has reserved consideration of whether an agency may be required to furnish data which is available from another source. See *Veterans Administration Regional Office, Denver, Colorado*, 10 FLRA No. 78, 10 FLRA 453, 458, fn. 11. Primarily, the General Counsel argues that the alternative sources are neither reasonable nor effective; and the record gives ample support to this position.[11]

a. Bulletin boards are available to the Union, but whether employees conscientiously read them is doubtful. Also, they are ineffective for communicating quickly with all unit employees. And they are an inappropriate means for communicating confidential, complex, or lengthy advice.

b. The internal mail system is not available to the Union for bulk mailing. The Union tried this once, and was stopped. See finding 17b, *supra*. Even if the Union limited the mailing to the 957 or so unit members for whom it lacks home addresses, this would surely be a "bulk" mailing.

c. The use of Respondent's bulletins and newspapers is subject to Respondent's editorial control and availability of space. Since material submitted must be submitted

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[10] Such proposed action by the Union does not seemingly violate 5 U.S.C. § 7116(b)(6), as Respondent alleges. See RBr 7 and 21. This provision prohibits unions from calling for a "strike, work stoppage, or slowdown."

[11] The harder issue posed by the General Counsel—whether there is an obligation to furnish even if other sources are available (see GCBr 22)—need not be reached in this case, in view of the conclusions reached herein.

several weeks in advance, they are also useless means for getting out urgent messages to all unit employees.

d. The right to meeting space during non-duty hours is subject to a 14-calendar day advance request and, thus, is also ineffective to getting across an urgent message.

e. While the Union had a network of some 24 or 25 officers and stewards available to contact, personally, unit employees at the time at issue, it would have taken an enormous amount of time from their representational obligations to contact the 957 or so unit employees for whom the Union lacked home addresses. The network did not cover all shifts of all organizational elements in all buildings. And access to employees working in secured areas was very limited. Flextime scheduling in effect also made it difficult for this network to gather information from, or communicate with unit employees.

f. Use of the telephone to contact 957 employees, while at work, would have been very time consuming, and would probably have raised the ire of supervisors as well. Calling these employees at home would have been a burdensome task, involving the use of multiple telephone directories to cover the two States and various localities within which the unit employees are dispersed. Although the Union office generally had contact with "maybe 15" unit employees over the course of a week, this would still leave a large number to contact. See finding 19, *supra*.

g. The use by 957 unit employees of the bus service between facilities, combined with their contractual right to visit the Union office or official time, would be impracticable and disruptive, when contact with all unit employees had to be accomplished over a short period.

h. Communication during the Union's semi-annual membership drives was of no help to the Union in the situation here at issue, where an immediate need arose.

Also, these drives are restricted to non-duty hours and non-work areas, with a requirement of a 10-day advance notice to Respondent for the use of equipment and facilities. See finding 20, *supra*.

i. Union meetings held monthly, in space provided by Respondent (see finding 17e, *supra*) are attended mostly by members for whom the Union already has home addresses.

j. Handbilling of employees has proved difficult because unit employees work flextime hours and are not readily identifiable by badge or uniform. See finding 22, *supra*.

k. While the Union newspaper can be distributed, on site, at three locations, (finding 17d, *supra*), unit employees not interested enough in the Union to become members can hardly be counted upon to conscientiously read its newspaper.

Respondent takes the position that, by all the above means and opportunities, the Union could have compiled the home addresses of all the unit employees. See RBr 9-11. However, such an effort would be considerably more burdensome than that required of Respondent. And, in any event the fact that the Union had not done so, at the time the urgent need arose in July 1982, does not relieve the Respondent of its statutory responsibilities, under 5 U.S.C. § 7114(b)(4).

Respondent relies upon a decision which arose under Executive Order 11491, which controlled Federal sector labor-management relations prior to the Statute.[12] See RBr 16, citing A/SLMR No. 214. This is a case entitled *Internal Revenue Service, Office of the District Director, Jacksonville District, Jacksonville, Florida* and is reported

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[12] This order is reprinted in the note at page 312 of 5 U.S.C. 7101 (Supp. V, 1981).

at page 524 of Volume 2 to *Decisions and Reports on Rulings of the Assistant Secretary of Labor for Labor-Management Relations* (referred to as "A/SLMR"). The Assistant Secretary adopted conclusions and recommendations of a hearing examiner dismissing a complaint of an unfair labor practice, based upon a refusal to furnish home addresses of unit employees to their exclusive bargaining representatives. The dismissal was based on a finding that the union had other effective means of communicating with unit employees. See 2 A/SLMR at 534. The decision of the Assistant Secretary was upheld by the Federal Labor Relations Council. See Volume 2, page 107 of *Decisions and Interpretations of the Federal Labor Relations Council* ("FLRC"). Both the Assistant Secretary and FLRC recognized that an exclusive representative was entitled to an effective means of communicating with unit employees and that, when such means were lacking, some agency help could be required even though, under the Executive Order there was no express provision requiring an agency to furnish information. Both the Assistant Secretary and FLRC agreed that decisions must be made on a case-by-case basis. While there are many similarities between the *Internal Revenue* case and this one, there are also several important distinctions. In *Internal Revenue,* all unit employees were accessible to union stewards (here some unit employees work in secured areas with restricted access). In *Internal Revenue,* about half the unit belonged to the union; and the union had their addresses, as it mailed them copies of the union newspaper. See 2 A/SLMR at 530. Here only about 26 percent of the unit belongs to the Union. In *Internal Revenue,* the agency provided each new employee with a card inviting the employee to furnish the union with a home address. In *Internal Revenue,* the ratio of stewards to unit employees was much lower—approximately 1 steward to 40 unit em-

ployees contrasted here with 1 to every 72 or 76 unit employees, at the time in issue in this case. And, perhaps of most importance, there was no urgency demonstrated in the *Internal Revenue* case.[13]

Both parties rely upon *Magna Company,* 208 NLRB 329 (1974), the Respondent correctly pointing out that the Board does not require the release of home addresses "under any and all circumstances" (RBr 17), and the General Counsel correctly pointing out that the Board weighs the "relative efforts" required of a union and the employer to obtain such information (GCBr 28). In *Magna,* the Board found the employer "possessed the information, and there [wa]s no indication that its compilation would be unduly onerous" (208 NLRB at 331). In *Magna,* the Board considered such facts as the wide dispersion of unit employees (90 miles in *Magna* and 100 miles here), the low membership of unit employees in the union (60 percent of the unit being members in *Magna* and only 26 percent here), the difficulty of handbilling unit employees in public ways leading into and out of the worksite when they are not easily distinguishable from non-unit employees, and the inadequacy of bulletin boards. See 208 NLRB at 330. Other factors were also considered relevant in *Magna* that are not present here. But, overall, the similarities between *Magna* and this case are striking—and the Board did order the employer to provide the union with the home addresses of unit employees.

6. Respondent also relies upon a position that the Union has "effectively represented unit employees since 1976 without having access to the home addresses of unit employees," and did not challenge Respondent's prior

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[13] Immediately following the discussion of the *Internal Revenue* case, Respondent cites and discusses a case identified only as "6 FLRA No. 211." See RBr 16. I could find no such case.

refusals to furnish home addresses (RBr 3 and 13). Respondent rests its "effective" representation allegation on the fact that the Union has negotiated two collective bargaining agreements with it. Just how "effective" these agreements are considered by unit employees who are not members of the Union is a matter for conjecture. The fact that the Union has not lost its status as exclusive representative is the only proof of effectiveness that can be gleaned from this record. In any event, the focus here, cannot be on the *general* effectiveness of the Union, but on how effectively it could represent non-union members in the unit as to the *particular* problem which generated the requests at issue here—the signing of the Secrecy Agreement.

Certainly, the Union did not waive its right to the home addresses of unit employees when it did not respond to Respondent's denial of such a request at an earlier time. A waiver of a right "must be clear and unmistakable;" and a "right to bargain need not be exercised at every opportunity." See, e.g., pages 7 and 8 of the decision of Judge Garvin Lee Oliver in *Department of the Air Force, Scott Air Force Base, Illinois,* 5 FLRA No. 2 (1981), which was adopted by the Authority. In this case, the Union did not pursue its rights to have addresses of unit employees, in 1981. See finding 25, *supra.* But this was not a clear and unmistakable waiver of its right to do so when, in 1982, an urgent need arose for it communicate by letter to the unit employees.

No waiver occurred, either, during negotiations over the current contract. See finding 23 and footnote 3, *supra.*

7. When data meets the criteria of 5 U.S.C. § 7114(b)(4), it must be "furnished" cost free.

The Authority has so held in *Veterans Administration Regional Office, Denver, Colorado,* 10 FLRA No. 78, 10 FLRA at 455-457 (1982). And Respondent has so agreed in

its collective bargaining agreement. See finding 24, *supra.* Under these circumstances, I must reject Respondent's argument that the Union should help defray the expenses involved in furnishing the data sought. See RBr 19.

8. No government-wide regulation prohibits Respondent from providing home addresses of unit employees to the Union.

In its brief, Respondent relies upon Federal Personnel Manual, Chapter 294, *Availability of Official Information,* Appendix C, paragraph C-1a(3) as being such a government-wide regulations. See RBr 20.[14] Appendix C was adduced by Respondent as its Exhibit 12. It is clearly labeled as a "Guide;" and it should be treated as such. While in its "Guide," OPM states that agencies "should not comply with requests from labor organizations for lists of home addresses . . . of employees," it is not OPM, but this Authority upon which Congress placed the responsibility for determining whether, under 5 U.S.C. § 7114(b)(4), such information should be furnished. The Authority has not yet ruled on the subject matter of producing home addresses pursuant to 5 U.S.C. § 7114(b)(4). Until the Authority does rule, OPM is free to issue any "guide" that seems appropriate to it. But such "guides" do not fetter this Authority, under 5 U.S.C. 7114(b)(4). OPM has seemingly so recognized in 1980 and 1982 issuances, discussed *infra.*

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[14] Respondent apparently is not relying on DOD directives, that it not release the addresses of unit employees. See finding 25, *supra.* In any event, those directives may be taken as modified by DOD's later approval of the collective bargaining agreement entered into in 1982 and which recognizes that release of data is subject to the statutory provisions of Public Law 95-454, i.e., the Federal Service Labor-Management Statute. See finding 24, *supra.*

9. Providing the home addresses of unit employees is not prohibited by the Privacy Act of 1974, 5 U.S.C. § 522a.

Even before passage of this Statute, it was recognized that "[n]either the language of the Privacy Act nor its legislative history indicate that Congress intended to preclude disclosure to recognized labor unions of relevant information under a collective bargaining agreement." *Local 2047, AFGE* v. *Defense General Supply Agency,* 423 F. Supp. 481, 485, fn. 7, 94 LRRM 2058 (E.D. VA 1976), aff'd *per curiam,* 573 F.2d 184, 97 LRRM 3207 (C.A. 4, 1978).

After enactment of the Federal Service Labor-Management Relations Statute, in 1978, OPM issued a "system notice," required under the Privacy Act, for the release of data from official personnel folders; and OPM recognized that the names and addresses of employees could be disclosed to officials of labor organizations recognized under the Federal Service Labor-Management Relations Statute "when relevant and necessary to their duties of exclusive representation concerning personnel policies, practices, and matters affecting working conditions." (45 FR 78415 and 78417 (11/25/80), recently reaffirmed in 47 FR 16489 (4/16/82)).

Respondent relies upon certain, distinguishable private-sector cases, arising under the NLRA (see footnote 5, *supra*), which hold that "employees are entitled to protections against unwarranted intrusions on their personnel privacy, even in the context of a collective bargaining relationship" (RBr 21).[15] Accepting this as a given, even in

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[15] For example, in *Detroit Edison Co.* v. *NLRB,* 440 U.S. 301, 100 LRRM 2728 (1979) the Court, in a split decision, declined to enforce a Board order which would have required the employer, unconditionally to turn over to the union, among other things, the actual scores

received by named employees on aptitude tests, where they had been assured of confidentiality. The union claimed a need for them in order to process a grievance of other applicants denied the jobs on the basis of low scores. The employer agreed only as to those employees who would sign a waiver of confidentiality. And the employer presented evidence that "disclosure of individual scores had in the past resulted in the harassment of some lower-scoring examinees who had, as a result, left the Company." See 100 LRRM at 2735. The Court also noted the "well known" fact of the "sensitivity of any human being to disclosure of information that may be taken to bear on his or her basic competence" (100 LRRM at 2734). No such sensitivity attaches to home addresses, which has been so recognized and tagged as having a "very much lower degree of disclosure." See *Getman* v. *N.L.R.B.*, 450 F.2d 670, 675 (C.A. D.C., 1971) a case also arising under the NLRA. The Supreme Court, in *N.L.R.B.* v. *Getman,*, denied an application to stay the judgment of a lower court that required the Board to turn over the home addresses. See 404 U.S. 1204 (1971).

In *Shell Oil Co.* v. *NLRB*, 457 F.2d 615, 79 LRRM 2997 (C.A. 9, 1972), the Court declined to enforce a Board order that the employer furnish the union the home addresses of all unit employees, where there was evidence that 9½ months before the request there had been a strike and harassment of non-strikers at their homes, and that there had also been recent violence by striking employees whom the union could not control. In that case, the employer had made counter proposals, that it would furnish the home addresses of those employees who consented and that it would furnish all names and addresses to an independent mailing service, which would mail all material which the union wanted to submit and certify the mailing to the union, at the expense of the employer.

Emeryville Research Center, Shell Development Company v. *NLRB*, 441 F.2d 880, 77 LRRM 2043 (C.A. 9, 1971) is cited for the refusal of the Court to require an employer to release wage and survey data because the employer had promised confidentiality to area employers surveyed, and compromise of that promise would make the sources of the data (other companies) unavailable in the future. Refusal to enforce was largely based upon the finding that the employer had been cooperative and tried to work with the union to put the information into a form which would have met both the union's needs and the employer's concerns.

In each of these cases, the employer made a reasonable counter proposal to the union and showed a real basis for not complying with the request of the union. Such is not the circumstance here.

Federal sector cases, no "unwarranted intrusion" is involved in the request for information here at issue. The unit employees here were being asked to sign a document that could forever subject them to possible criminal prosecution. The Union was asking for their home addresses so that it could quickly advise them of their perils and rights, and that it was trying to negotiate some protection for them. Other available means by which the Union could contact them were inadequate, in the particular situation faced by the Union when it made the requests. And there was no evidence that the Union would make any improper use of the home addresses, or that their disclosure to the Union would create a "likelihood of a clear and present danger to employees," a standard that has been used in some private-sector cases. See, e.g., *Shell Oil Co.* v. *NLRB,* 457 F.2d 615, 79 LRRM 2997 at 3000 (C.A. 9, 1972).

10. By its refusal to furnish the home addresses of unit employees, Respondent has engaged in unfair labor practices under 5 U.S.C. 7116(a)(1), (5), and (8).

Respondent's action has interfered with its employees' right "to engage in collective bargaining with respect to conditions of employment through representatives chosen by employees under the [Statute]" (5 U.S.C. § 7102(2)), in violation of 5 U.S.C. § 7116(a)(1), quoted fully in footnote 1, *supra.* Signing the Secrecy Agreement was clearly made a "condition of employment" by Respondent. See findings 7 and 8, *supra.*

The Authority has consistently held that, notwithstanding a specific violation of 5 U.S.C. § 7116(a)(8), a refusal to provide data is also a failure of the duty to negotiate in good faith, in violation of 5 U.S.C. § 7116(a)(5).[16] See

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[16] Respondent has not "fully understood" the basis for the 5 U.S.C. § 7116(a)(5) allegation. See TR 26.

Veterans Administration Regional Office, Denver, Colorado, 10 FLRA No. 78, 10 FLRA 453, 457 (1982) and *Bureau of Alcohol, Tobacco and Firearms, National Office and Western Region, San Francisco, California,* 8 FLRA No. 108, 8 FLRA 547, 557 (1982). Even in data-request cases where a violation of 5 U.S.C. § 7116(a)(8) was not found by the Administrative Law Judge, the Authority sustained a finding that 5 U.S.C. § 7116(a)(5) was violated for improperly refusing to provide data. See *Veterans Administration Regional Office, Denver, Colorado,* 7 FLRA No. 100, 7 FLRA 629 (1982).

Respondent's refusal to comply with 5 U.S.C. 7114(b)(4) constitutes an unfair labor practice under 5 U.S.C. § 7116(a)(8).

Utimate Findings and Recommended Order

Respondent has engaged in the unfair labor practices alleged in the complaint.

Accordingly, and pursuant to 5 CFR § 2423.29 and 5 U.S.C. §7118, the Authority hereby orders that the Respondent shall:

1. Cease and desist from:

   (a) Refusing or failing to furnish, upon request of the National Federation of Federal Employees, Local 1827, hereinafter NFFE, the names and addresses of all unit employees.

   (b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute.

(a) Upon request, make available to NFFE the names and addresses of all unit employees.

(b) Post at its facilities at the Defense Mapping Agency Aerospace Center, St. Louis, Missouri, copies of the Notice To All Employees, attached hereto as Appendix B, on forms to be furnished by the Acting Regional Director, Region VII, Federal Labor Relations Authority. Upon receipt of such forms they shall be signed by the Commander, Defense Mapping Agency Aerospace Center, St. Louis, Missouri, and shall be posted and maintained by him for sixty (60) consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Commander shall take all reasonable steps to insure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to Section 2423.30 of the Authority's Rules and Regulations, notify the Acting Regional Director, Region VII, Federal Labor Relations Authority, in writing within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

/s/ ISABELLE R. CAPPELLO
ISABELLE R. CAPPELLO
Administrative Law Judge

Dated: May 12, 1983
Washington, DC

APPENDIX B

NOTICE TO ALL EMPLOYEES
PURSUANT TO
A DECISION AND ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY
AND IN ORDER TO EFFECTUATE THE POLICIES OF
CHAPTER 71 OF TITLE 5 OF THE
UNITED STATES CODE
FEDERAL SERVICE LABOR-MANAGEMENT
RELATIONS STATUTE
WE HEREBY NOTIFY OUT EMPLOYEES THAT:

WE WILL NOT refuse to furnish, upon request to the National Federation of Federal Employees, Local 1827, hereinafter NFFE, the names and addresses of all unit employees.

WE WILL, upon request, furnish to NFFE the names and addresses of all unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce any employee in the exercise of rights assured by the Federal Service Labor-Management Relations Statute.

_____
(Agency or Activity)

Dated: _____ By: _____
(Signature)

This Notice must remain posted for sixty (60) consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Acting Regional Director of the Federal Labor Relations Authority, Region VII, whose address is: 1531 Stout Street, Suite 301, Denver, Colorado 80202, and whose telephone number is: (303) 837-5224.

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No. 88-349

In the Supreme Court of the United States

OCTOBER TERM, 1988

FEDERAL LABOR RELATIONS AUTHORITY, PETITIONER

v.

UNITED STATES DEPARTMENT OF AGRICULTURE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENTS

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QUESTION PRESENTED

Whether 5 U.S.C. 7114(b)(4) and the Freedom of Information Act, 5 U.S.C. (& Supp. IV) 552, require the disclosure of employee home addresses to the labor union that represents those employees, but only after each employee has been individually consulted and given a chance to veto the disclosure of his or her home address.

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In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-349

FEDERAL LABOR RELATIONS AUTHORITY, PETITIONER

v.

UNITED STATES DEPARTMENT OF AGRICULTURE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 19a-32a) is reported at 836 F.2d 1139. The opinions of the Federal Labor Relations Authority (Pet. App. 38a-55a, 81a-89a) are reported at 23 F.L.R.A. 788 and 24 F.L.R.A. 43.

JURISDICTION

The judgment of the court of appeals (Pet. App. 19a-32a) was entered on January 15, 1988. Petitions for rehearing were denied on March 29, 1988

(Pet. App. 35a-36a), and the order denying rehearing was amended on April 1, 1988 (Pet. App. 37a). On June 21, 1988, Justice Blackmun extended the time within which to petition for a writ of certiorari to and including August 29, 1988. The petition was filed on August 26, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case involves two decisions of the Federal Labor Relations Authority (Authority or FLRA) holding that federal agencies are required by the Federal Service Labor-Management Relations Statute (Civil Service Reform Act of 1978, Tit. VII) (Labor Statute), 5 U.S.C. (& Supp. IV) 7101 *et seq.* —specifically 5 U.S.C. 7114(b)(4)—to provide to unions the names and home addresses of federal employees who are within the "bargaining units" represented by the unions but are not necessarily union members. The court of appeals generally affirmed the Authority's decisions but remanded for the Authority to devise a procedure for individual employees to decide whether their addresses would be released to the unions.

1. Section 7114(b)(4) of the Labor Statute requires a federal employer to furnish "data" to the union representative of a bargaining unit "which is [*sic*] reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining," but only "to the extent" that provision of such information is "not prohibited by law." After initially holding that this statute does not require federal employers to provide a labor union with names

and home addresses of employees represented by the union, the Authority reversed itself to hold that such disclosure is not prohibited by law and meets the other requirements of Section 7114(b)(4).

a. In the first of the cases presented in the petition, the American Federation of Government Employees, Local 3354, AFL-CIO (AFGE or union), relying on Section 7114(b)(4), requested a list of names and home addresses of bargaining-unit employees represented by AFGE and employed by the Farmers Home Administration Finance Office, St. Louis, Missouri (FmHA) (Pet. App. 64a). AFGE claimed that it needed the information to "obtain the[] views [of employees] on bargaining priorities" and asserted that "available communication channels [were] inadequate" for that purpose (*id.* at 66a).[1] FmHA denied the request on the ground that disclosure without employee consent would violate the Privacy Act, 5 U.S.C. (& Supp. IV) 552a. Pet. App. 66a.

AFGE filed an unfair-labor-practice charge with the Authority, contending that the agency's refusal to furnish the requested names and home addresses violated 5 U.S.C. 7116(a)(1), (5), and (8), and the Authority issued a complaint (Pet. App. 63a-64a). The administrative law judge (ALJ) issued a decision, holding that FmHA had not committed an unfair labor practice by refusing to disclose the requested information (*id.* at 63a-80a). The ALJ concluded that the union had effective alternative means of communicating with its members and recom-

[1] During the hearing on this case before the ALJ, AFGE "acknowledged freely that addresses were vitally needed in connection with membership drives" and "for the purpose of recruiting new members" (Pet. App. 66a).

mended that the complaint be dismissed (*id.* at 74a-80a).[2]

b. On July 22, 1985, the Authority affirmed the ALJ's decision. Pet. App. 56a-62a (*FmHA I*). In *FmHA I*, the Authority concluded that the "prohibited by law" proviso to Section 7114(b)(4) incorporates the relevant provisions of the Privacy Act, 5 U.S.C. (& Supp. IV) 552a, which generally prohibits disclosure of information about individuals by federal agencies without their consent unless an exception applies. Since one of the exceptions to the Privacy Act (5 U.S.C. 552a(b)(2)) permits disclosure of information "required" to be released under the Freedom of Information Act (FOIA), 5 U.S.C. (& Supp. IV) 552, the Authority looked to Exemption 6 of FOIA—which permits withholding of "personnel * * * medical * * * and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy" (5 U.S.C. 552(b)(6))—to determine whether the refusal to disclose was proper. Pet. App. 58a-59a. Based on the employees' " 'strong privacy interest in their home addresses,' " the Authority concluded that "disclosure of unit employees' names and home addresses for the purposes for which they were sought herein was 'prohibited by law,' " that "their release * * * was not required pursuant to section 7114(b)(4)," and that the complaint should be dismissed. Pet. App. 60a-61a (quoting *AFGE, Local 1923* v. *HHS*, 712 F.2d 931 (4th Cir. 1983)).[3]

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[2] In view of his conclusion, the ALJ found it unnecessary to pass on the agency's claim that disclosure would violate the Privacy Act (Pet. App. 80a n.10).

[3] In so ruling, the Authority did not address whether another exception to the Privacy Act's disclosure requirements

Because it held that release of the addresses is "prohibited by law" within the meaning of Section 7114(b)(4), the Authority found it unnecessary to "reach the question of whether the data sought herein meets [*sic*] the other requirements of section 7114 (b)(4)" (Pet. App. 61a n.8). Thus, the decision in *FmHA I* expressed no view on the question whether employee home addresses constitute data "necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining" (5 U.S.C. 7114(b)(4)(B)).

c. As permitted by 5 U.S.C. 7123(a), the union filed in the D.C. Circuit a petition for review of the Authority's decision in *FmHA I* (see Pet. App. 39a). Before the case was briefed, the Authority moved for and was granted a remand in order to address whether disclosure of the names and home addresses is not "prohibited by law" because of the "routine use" exception (see note 3, *supra*) to the Privacy Act. *AFGE, Local 3354* v. *FLRA*, No. 85-1493 (D.C. Cir. Mar. 3, 1986).[4]

—"for a routine use" that "is compatible with the purpose for which [the record] was collected" (5 U.S.C. 552a(a)(7), (b)(3))—might also apply.

[4] At the same time, the Authority requested remand of three other cases (including the companion case here) in which unions had petitioned for review of Authority decisions that had followed the precedent established in *FmHA I*. See Pet. App. 39a-40a (collecting citations). Both the D.C. Circuit and the Eighth Circuit granted the Authority's motions, but the Second Circuit denied the motion and proceeded to decide the case on the merits. *AFGE, Local 1760* v. *FLRA*, 786 F.2d 554 (2d Cir. 1986). Noting its perception that "the privacy interest of the average employee in his address is not particularly compelling," that the ALJ in that case had found that "other means of communication [were] inadequate," and

d. On remand, the Authority reversed its *FmHA I* decision. Pet. App. 38a-55a (*FmHA II*). In *FmHA II*, the Authority reiterated its holding that the "prohibited by law" proviso in 5 U.S.C. 7114(b)(4) requires application of the Privacy Act and FOIA. The Authority now held, however, that disclosure of federal workers' names and home addresses is not protected by FOIA Exemption 6 and therefore is not prohibited by the Privacy Act. Pet. App. 43a-45a. Agreeing with the Second Circuit in *AFGE, Local 1760* that " 'the privacy interest of the average employee in his address is not particularly compelling' " (Pet. App. 44a (quoting 786 F.2d at 556); see note 4, *supra*), the Authority concluded that the "public interest to be furthered by providing the Union with an efficient method to communicate with unit employees it must represent far outweighs the privacy interest of individual employees in their names and home addresses" (Pet. App. 45a).

The Authority also concluded that disclosure is authorized by the "routine use" exception to the Privacy Act, 5 U.S.C. 552a(b)(3). Relying on a "routine use" notice issued by the Office of Personnel Management (OPM) (49 Fed. Reg. 36956 (1984)), which provides for disclosure of certain information to labor organizations "when relevant and necessary

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that the union had received "statutory approval * * * as collective bargaining agent" for employees under the Labor Statute, the Second Circuit reversed the Authority's decision; the court held that "release of the employees' addresses is not 'prohibited by law' within the meaning of * * * 5 U.S.C. 7114(b)(4)." 786 F.2d at 556-557. The court also held that it was "clear" that the "other requirements for release contained in the Statute" (*i.e.*, that the requested data be necessary to collective bargaining) were met, even though the Authority itself had not passed on that question (*id.* at 557).

to their duties of exclusive representation," the Authority concluded that OPM's "routine use" notice is "effectively the same" as the requirement of Section 7114(b)(4) that the data sought be " 'necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining' " (Pet. App. 45a). Based on its determination that "disclosure of the names and home addresses of bargaining unit employees to the Union is necessary * * * for the Union to discharge its statutory obligations," the Authority held that disclosure is authorized as a "routine use" under the Privacy Act (*id.* at 46a).

Having abandoned its prior holding that disclosure is prohibited by law, the Authority was now required to address the threshold question, which it had previously avoided (Pet. App. 61a n.8), whether employee home addresses are the kind of "data" addressed by Section 7114(b)(4) (*i.e.*, whether they are "necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining"). The Authority now answered that question in the affirmative, rejecting agency arguments that (1) employee home addresses are unrelated to the bargaining process—as opposed to a union's other representational functions—and thus are not "necessary" according to the plain language of the statute and (2) in any event such addresses cannot be "necessary"—as opposed to merely useful—to the union unless the union lacks adequate alternative means of communication with the employees. As to the first of those arguments, the Authority held, without mentioning the limiting phrase "collective bargaining" in Section 7114(b)(4)(B), that "[i]t is obvious that a union must be able to identify

and communicate with * * * bargaining unit members if it is to adequately represent them" (Pet. App. 48a). As to the second, the Authority held, again without adverting to the language of the statute, that "[w]e will not review the adequacy of alternative methods of communication on a case-by-case basis" (*id.* at 49a).[5]

2. a. In the second case here, the National Federation of Federal Employees, Local 1827 (NFFE or union), requested "a complete listing of bargaining

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[5] The Authority has since directly contradicted that holding in argument before the Third Circuit. In contrast to its explicit refusal in *FmHA II* to consider alternative means of communication available to the union as part of determining whether names and home addresses are "necessary" within the meaning of Section 7114(b)(4), the Authority stated before the Third Circuit that "in each case it has considered the alternative means available." *Department of Navy* v. *FLRA*, 840 F.2d 1131, 1139 (1988), cert. dismissed, No. 88-356 (Oct. 5, 1988). The Third Circuit relied on that assurance from the Authority and, in the particular case before the court, affirmed the Authority's order of disclosure, stating that "in this case the FLRA's conclusion that the alternative means of communication are inadequate is amply supported by the record" (840 F.2d at 1139). In the order that the Third Circuit was reviewing, however, the Authority had reached no such case-specific conclusion, relying instead on the per se rule of *FmHA II* that names and home addresses are "necessary" without regard to the existence of alternaitve means of communication. See *Philadelphia Naval Shipyard*, 24 F.L.R.A. 37 (1986). In its prior (pre-*FmHA II*) order in the same case—the only time the Authority did reach a case-specific conclusion about the adequacy of alternative means of communication—the Authority had held that the alternative means of communication available to the union *were* adequate, the precise opposite of the (nonexistent) conclusion that the Third Circuit purported to affirm. See *Philadelphia Naval Shipyard*, 19 F.L.R.A. 899, 901 & n.5 (1985).

unit members names and addresses" from the Defense Mapping Agency Aerospace Center, St. Louis, Missouri (DMA). The union stated that the request was made "[i]n order for the Union to communicate with bargaining unit members." Pet. App. 101a-102a. The agency denied the request on the basis that the information was not maintained in a " 'reasonably available' form" (Pet. App. 105a). NFFE filed an unfair-labor-practice charge with the Authority, and the Authority issued a complaint (*id.* at 99a). An ALJ issued a decision, holding that DMA's refusal to release the requested information constituted an unfair labor practice (*id.* at 98a-136a). The ALJ concluded that the requested information was "reasonably available," that the other requirements of Section 7114(b)(4) had been met, and that "alternative sources are neither reasonable nor effective" (Pet. App. 114a-129a). The ALJ also concluded that release would not violate the Privacy Act (*id.* at 130a-132a).

b. The Authority reversed the decision of the ALJ (Pet. App. 92a-97a). Relying on its prior decision in *FmHA I*, the Authority concluded that "disclosure of unit employees' names and home addresses * * * was 'prohibited by law' and * * * their release by [DMA] was not required pursuant to section 7114 (b)(4)" (Pet. App. 96a). As we have noted (see note 4, *supra*), NFFE sought review of that decision before the Eighth Circuit and, before briefing, the Authority sought and obtained a remand of the decision "to consider the 'routine use' question" (see Pet. App. 21a).

c. On remand, the Authority reversed itself and, in reliance on its decision in *FmHA II*, affirmed the ALJ's decision, "conclud[ing] that the release of the

names and home addresses of bargaining unit employees * * * is not prohibited by law, is necessary for unions to fulfill their duties under the Statute, and meets the other requirements of section 7114 (b) (4)." Pet. App. 85a. The Authority also held that DMA's refusal to furnish the requested information constituted an unfair labor practice (*id.* at 85a-86a).

3. On the agencies' petitions for review and the Authority's cross-petitions for enforcement, the court of appeals partially affirmed both decisions but remanded for certain additional proceedings (Pet. App. 19a-32a). Agreeing with the Authority's determination that, "in order for a union to properly represent the employees [in the bargaining unit,] it must be able to communicate with them," the court of appeals held that Section 7114(b) (4) "provides a statutory basis entitling the union to some effective means of communication with unit employees" (Pet. App. 23a). Framing the issue as "whether to uphold the Authority's determination that disclosure to the union is necessary to fair and effective bargaining and representation," the panel majority also held that the Authority's position that "direct communication with employees at home * * * will best serve the purposes underlying the labor statute" was not "irrational" or "arbitrary or capricious" (*id.* at 24a).

Turning next to the FOIA privacy exemption (and "weigh[ing] the privacy interest of the employees against the interests of the public in disclosure"), the court of appeals concluded that, although "employees have a cognizable privacy interest in their home addresses," it would "defer to the Authority's expertise insofar as it has determined that disclosure in general will help effect the policies embodied in the

[Labor Statute]" (Pet. App. 27a-28a). Hence, the panel affirmed the Authority's determination that the requested information is generally disclosable under the Labor Statute. In closing, however, the panel expressed concern with the potential objections of individual employees "who do not wish to have their names and addresses disclosed" and the Authority's response that such individuals could simply "have their names removed from the union mailing list" (*id.* at 28a). In order to provide a "workable formula" for accommodating "the privacy interests of employees and the need of the union to communicate effectively" under its disclosure order, the panel directed the FLRA on remand to devise a procedure by which "employees [could] request their employers to keep the information confidential" (*id.* at 28a-29a). Chief Judge Lay dissented from the panel's holding, insofar as it permitted "employees [to] ask their *employers* to keep the information confidential," because he concluded that such a requirement was without legal basis and abdicated the court's responsibilities under the relevant statutes (*id.* at 31a-32a (emphasis in original)).

ARGUMENT

Although we disagree with the Authority on many aspects of this case, we agree with the Authority that the judgment of the court of appeals should not be permitted to stand. For two reasons, however, this case does not warrant plenary review by this Court. First, respondents are in the process of promulgating "routine uses" that will permit them to disseminate the home addresses of employees to the unions that represent those employees. Because those "routine uses" will completely remove any bar that the Pri-

vacy Act might otherwise impose to the disclosures sought in this case—without any employee opt-out procedure as required by the court of appeals—the court of appeals should be directed to reconsider its judgment in light of the routine uses. On such reconsideration, we will agree with the Authority that the court of appeals should enforce the Authority's orders in full. Second, although we think the correct result in this case (before respondents' adoption of "routine uses") would have been to reverse the Authority in full—and deny disclosure of any employee home addresses—we agree with the Authority that the middle ground the court of appeals attempted to stake out between our position and the Authority's position is entirely without legal basis. Thus, even in the absence of material changes postdating the decision of the court of appeals, we would not defend the judgment of the court of appeals but would instead advocate summary reversal of the court's remand order.

1. We have not cross-petitioned for review of the Eighth Circuit's decision insofar as it affirms the Authority in part, but we will briefly set out our view of the merits to illuminate our reasons for urging the Court to vacate the judgment of the court of appeals. In our view, the court of appeals should have held that 5 U.S.C. 7114(b)(4) does not require the disclosure of employee home addresses and should have reversed the Authority's orders in their entirety. There are two distinct reasons why that would have been the correct result. First, the threshold criteria of Section 7114(b)(4) are not met in this case, and the requirement of disclosure of employee home addresses pursuant to that section therefore is improper even without regard to whether such disclosure is

"prohibited by law." Second, even if we assume arguendo that employee home addresses meet the threshold criteria of Section 7114(b)(4), disclosure of employee home addresses is not mandated by FOIA —because Exemption 6, for "clearly unwarranted invasion[s] of personal privacy," applies—and therefore (in the absence of applicable "routine uses") is "prohibited by law" (*i.e.*, by the Privacy Act) within the meaning of Section 7114(b)(4).

a. Section 7114 is expressly and exclusively concerned with "[t]he duty of an agency and an exclusive representative to negotiate in good faith," *i.e.*, the collective-bargaining process. Accordingly, Section 7114(b)(4) has no application at all except to data that are "reasonably available and necessary for full and proper discussion, understanding, and negotiation of *subjects within the scope of collective bargaining* (5 U.S.C. 7114(b)(4)(B) (emphasis added)). The term "collective bargaining," in turn, is defined in the Labor Statute to refer only to the actual process of contract negotiations and agreement, not to subsequent representation or other activities by a union on behalf of its members (5 U.S.C. 7103(a)(12)). The legislative history of Section 7114(b) supports this limited construction. See H.R. Rep. 95-1403, 95th Cong., 2d Sess. 48 (1978) (referring to "data necessary for the negotiations"). The Authority held that this Section applies to employee home addresses without making any effort at all to show a link between those addresses and the collective-bargaining process (Pet. App. 48a). For that reason alone, the Authority's orders should not have been enforced.

Furthermore, Congress deliberately chose the word "necessary" in Section 7114(b)(4). If adequate al-

ternative means of communication are available to the union, then it cannot properly be said—if words have their ordinary meaning—that it is "necessary" for the union to have home addresses as well in order to communicate with the employees. The Authority has effectively conceded as much even while continuing to hold federal employers guilty of unfair labor practices without regard to the availability of alternative means of communication (see note 5, *supra*). For this reason as well, enforcement of the Authority's orders should have been denied.

b. Even if employee home addresses are, as the Authority contends, per se "necessary" within the meaning of Section 7114(b)(4), it is undisputed that disclosure of those addresses still is not required if it is "prohibited by law," and it is also undisputed that disclosure is prohibited by the Privacy Act unless one of the Privacy Act's exceptions applies. The Privacy Act exception for "routine uses" (5 U.S.C. 552a(b)(3)) does not, at present, apply to this case.[6]

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[6] The Authority has incorrectly contended that the "routine use" exception does apply, because of OPM's routine use for disclosure of certain information "relevant and necessary" to unions' duties. Whatever the word "necessary" may mean in 5 U.S.C. 7114(b)(4), a matter that depends on the intent of Congress, the use of that word in an agency regulation must be interpreted in accordance with that agency's intent. See, *e.g.*, *Mullins Coal Co.* v. *Director, Office of Workers' Compensation Programs*, No. 86-327 (Dec. 14, 1987), slip op. 22-23 (quoting *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)). As we explained in our reply brief in the court of appeals in this case (at 15), citing comments that OPM itself filed before the Authority in *FmHA II* (but that the Authority appears to have ignored), OPM construes the word "necessary" in its routine use literally, to mean that disclosure is not required unless the union has no adequate

But see pp. 20-22, *infra*. Disclosure is therefore prohibited by the Privacy Act unless the exception for disclosures required by FOIA (5 U.S.C. 552a (b)(2)) applies.

Disclosure of employee home addresses is not required by FOIA because it would constitute a "clearly unwarranted invasion of personal privacy" within the meaning of FOIA Exemption 6, 5 U.S.C. 552 (b)(6). Abundant case law supports the proposition that an employee's home address is imbued with a strong privacy interest; many courts have protected that information under Exemption 6.[7] Likewise, abundant case law supports the proposition that any privacy interest cognizable under Exemption 6 is to be balanced against the *public* interest in disclosure, not against any particular requester's interest in disclosure.[8] Thus, only by considering a factor that is,

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means of communication. No court has yet passed on our contention that the Authority has misconstrued OPM's routine use.

[7] *Local 3, IBEW* v. *NLRB*, 845 F.2d 1177 (2d Cir. 1988); *Minnis* v. *Department of Agriculture*, 737 F.2d 784, 787 (9th Cir. 1984), cert. denied, 471 U.S. 1053 (1985); *Heights Community Congress* v. *Veterans Administration*, 732 F.2d 526, 529 (6th Cir.), cert. denied, 469 U.S. 1034 (1984); *AFGE, Local 1923* v. *HHS*, 712 F.2d 931, 932 (4th Cir. 1983); *Madeira Nursing Center, Inc.* v. *NLRB*, 615 F.2d 728, 731 (6th Cir. 1980); *Pacific Molasses Co.* v. *NLRB*, 577 F.2d 1172, 1183 (5th Cir. 1978); *Committee on Masonic Homes* v. *NLRB*, 556 F.2d 214, 221 (3d Cir. 1977); *Wine Hobby USA, Inc.* v. *IRS*, 502 F.2d 133, 136-137 (3d Cir. 1974); see also *United Association of Journeymen, Local 598* v. *Department of the Army*, 841 F.2d 1459, 1465 (9th Cir. 1988) (Skopil, J., concurring).

[8] *Schell* v. *HHS*, 843 F.2d 933, 938 & n.2 (6th Cir. 1988); *Department of the Air Force* v. *FLRA*, 838 F.2d 229, 233

legally, totally irrelevant—the specific "need" of the unions in these cases for this information—can a court distinguish the multitude of cases protecting home addresses under Exemption 6.[9] The courts should not rely on such irrelevancies but should instead apply in this context the case law holding that home addresses are protected by Exemption 6. For that reason, and because the Authority misconstrued 5 U.S.C. 7114(b), the court below should have denied enforcement of the Authority's orders in their entirety.

(7th Cir. 1988), cert. dismissed, No. 88-354 (Oct. 5, 1988); *Aronson* v. *HUD*, 822 F.2d 182, 185-186 (1st Cir. 1987); *Reporters Committee for Freedom of the Press* v. *Department of Justice*, 816 F.2d 730, 741-742, modified, 831 F.2d 1124 (D.C. Cir. 1987), cert. granted, No. 87-1379 (Apr. 18, 1988); *Washington Post Co.* v. *HHS*, 690 F.2d 252, 258 & n.17 (D.C. Cir. 1982); *Ditlow* v. *Shultz*, 517 F.2d 166, 172 n.21 (D.C. Cir. 1975); see also Easterbrook, *Privacy and the Optimal Extent of Disclosure Under the Freedom of Information Act*, 9 J. Legal Stud. 775, 781 & nn.34 & 35 (1980).

[9] Consideration of that legally irrelevant factor is precisely the error that the FLRA committed in its lead case (see Pet. App. 45a) and that one court has committed in upholding an FLRA order similar to the ones in this case. *Department of Navy* v. *FLRA*, 840 F.2d at 1136-1137. Two other courts, and the Authority (see Pet. App. 44a), have simply disagreed with all of the cases suggesting that one's privacy interest in a home address is strong. *Department of the Air Force* v. *FLRA*, 838 F.2d at 232 (interest is "minuscule"); *AFGE, Local 1760* v. *FLRA*, 786 F.2d at 556 ("not particularly compelling"). One other court, which had previously and correctly recognized that an employee's privacy interest in his home address is sufficient to defeat a union's FOIA request, inexplicably chose to "defer" to the Authority's contrary conclusion. Compare *HHS* v. *FLRA*, 833 F.2d 1129, 1135 (4th Cir. 1987), cert. dismissed, No. 88-355 (Oct. 5, 1988), with *AFGE, Local 1923* v. *HHS*, *supra*.

2. We believe that the analysis outlined above is correct, but the courts that have so far considered the Authority's orders requiring disclosure of employee home addresses have not accepted our analysis. Given the current state of the case law, we have decided not to cross-petition for a writ of certiorari to review the judgment of the court of appeals insofar as it accepts the Authority's analysis. Thus, for purposes of the current proceeding we must accept the proposition that the threshold criteria of 5 U.S.C. 7114(b)(4) are met and that the case turns entirely on whether disclosure of employee home addresses is otherwise "prohibited by law." As noted above, we believe that disclosure is so prohibited because of the Privacy Act and FOIA Exemption 6. The Authority originally reached that conclusion but now advances the opposite theory. Whichever theory may be correct (ours or the Authority's), what cannot be correct is the theory of the court of appeals that disclosure is permitted (and required) by law if but only if the employee is given an advance opportunity to veto the disclosure and elects not to do so.

Although we strongly disagree with the Authority's sweeping pronouncements concerning the need for an unrestricted "flow of data" concerning federal employees to a union representative under the provisions of the Labor Statute (Pet. 15-18, 24-25), we would agree, in the context of a request from the exclusive representative for the names and home addresses of members of the "bargaining unit," that there is nothing in the language of either Section 7114(b)(4) or its legislative history [10] that suggests

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[10] See H.R. Rep. No. 95-1403, 95th Cong., 2d Sess. 48 (1978) (agency's duty to furnish "reasonably available data necessary for [collective-bargaining] negotiations" to the exclusive representative).

that Congress understood that bargaining unit members would have an unqualified, "individualized" veto over the release of such information.

Nor do we find support for such a requirement under the provisions of either the Privacy Act or FOIA. The Privacy Act was enacted by Congress "to protect the privacy of individuals identified in information systems maintained by Federal agencies" (Pub. L. No. 93-579, § 2(a)(5), 88 Stat. 1896), but the very structure of the statute itself—which provides for nondisclosure *unless either* individual consent is obtained *or* one of twelve exemptions has been satisfied—indicates that Congress understood that an individual would *not* have an absolute veto over disclosure of information. See 5 U.S.C. (& Supp. IV) 552a(b)(1)-(12). Rather, despite an individual's lack of consent, the Privacy Act authorizes disclosure of information about that individual in a specified number of instances, one of which is when the information is disclosable under FOIA. 5 U.S.C. (& Supp. IV) 552a(b) ("[n]o agency shall disclose any record * * * except * * * with the prior written consent of * * * the individual to whom the record pertains, *unless* disclosure of the record [falls within one of the twelve exceptions, including FOIA]") (emphasis added).

Similarly, the courts have held that FOIA does not require an agency "to track down an individual about whom another has requested information merely to obtain the former's permission to comply with the request." *Blakey* v. *Department of Justice*, 549 F. Supp. 362, 365 (D.D.C. 1982) (applying Exemption 7(C)), aff'd mem., 720 F.2d 215 (D.C. Cir. 1983); cf. *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 161-162 (1975) ("insofar as the order of the court

below requires the agency to create [additional documents to respond to a FOIA request], it is baseless"). Rather, when dealing with a request for information under FOIA, the disclosure of which might result in "a clearly unwarranted invasion of personal privacy," 5 U.S.C. 552(b)(6), an agency (and ultimately, a court) is required to "balanc[e] the public's right to disclosure against the individual's right to privacy" (*Department of the Air Force* v. *Rose*, 425 U.S. 352, 372 (1976))—a test that contemplates that, under some circumstances, private information about individuals may be released, despite the lack of consent.

No court has ever before imposed an opt-out requirement in the name of the Privacy Act or FOIA, and with good reason. The Privacy Act imposes monetary liability on the United States for "intentional or willful" disclosures in violation of the Act (5 U.S.C. 552a(g)(4)), and if an opt-out requirement became established law the government would be threatened with monetary liability every time it gave out any information (no matter how innocuous) about an individual without first seeking and obtaining that individual's consent. If Congress had intended to impose such a tremendous burden of prior consultation on federal agencies, it would have said so in the statute. It is not open to the courts at this late date to "discover" for the first time that either the Privacy Act or FOIA contains such an unarticulated and heretofore unheard-of requirement to seek advance consent before every disclosure. Rather, the correct means of striking the balance between individual privacy and the public interest in disclosure of information is, as the Authority argues (Pet. 18-22, 25-27), the traditional balancing of interests by the agency, subject to judicial review. We do not agree

with the Authority's current position as to how that balancing should come out in this context, but we agree with the Authority that such balancing, and not an employee veto provision that seems "optimal[]" to a court (Pet. App. 29a) but has no statutory foundation, should be the basis for resolving this case. Thus, if there had been no further legal developments since the Eighth Circuit rendered its decision, we would urge that the Court accept the Authority's argument to the extent we have indicated and summarily reverse the decision below so that the court of appeals could determine, applying the proper balancing test, whether full disclosure or full withholding of employee home addresses is the appropriate result in this case.

3. Because the Eighth Circuit's "solution" to the problem posed by these cases is not an acceptable one, respondents have elected not merely to rely on the possibility that this Court would reverse the Eighth Circuit on the merits. Instead, acting within the confines of powers granted them by Congress, respondents have taken steps that should make it possible to release the information sought by the unions—without any requirement that employees be given an advance opportunity to "opt out"—in this case even if the Eighth Circuit's reasoning were correct.[11]

Under 5 U.S.C. 552a(a)(7) and (e)(4)(D), agencies have the power to promulgate "routine use[s]," compatible with the purpose for which information was collected, that permit the disclosure of information without regard to the applicability of any other exception in the Privacy Act (see 5 U.S.C. 552a(b)

[11] We would, of course, prefer a solution that would permit the withholding of all of this information, but it is not within respondents' power to bring about that result.

(3)). Accordingly, on October 11, 1988, the Department of Agriculture (the parent agency of respondent FmHA) published for comment a routine use to permit disclosure to "labor organizations recognized under 5 U.S.C. Chapter 71" of "home addresses or designated mailing addresses of bargaining unit employees" (53 Fed. Reg. 39629). The routine use will become effective on November 10, 1988, without further notice unless comments are received that would require a contrary determination (*ibid.*). Likewise, the Department of Defense (the parent agency of respondent DMA) plans in the near future to publish a routine use that will cover DMA's disclosure to a labor organization of the precise information sought in this case. We will, of course, promptly notify the Court of publication of DMA's routine use and finalization of both routine uses.

Once those routine uses are in place, it will be clear that 5 U.S.C. 552a(b)(3) excepts particular disclosures of the employee home addresses at issue in this case from the prohibition on disclosure contained in the Privacy Act, *whether or not* any other Privacy Act exception applies. Because the Privacy Act exceptions are stated in the alternative (5 U.S.C. (& Supp. IV) 552a(b)(1)-(12)), it will be improper, once the exception for "routine use[s]" clearly applies, to rely on the exception (5 U.S.C. 552a(b)(2)) for disclosures required by FOIA as a basis to limit the disclosure to collective-bargaining representatives of the precise information sought in this case. In other words, the Eighth Circuit's novel FOIA analysis will become irrelevant. Accordingly, the Court should hold the petition pending finalization of the two routine uses and should then vacate the judgment of the Eighth Circuit and remand for further proceedings.

Because the Eighth Circuit has already determined (Pet. App. 22a-24a) that the threshold requirements of 5 U.S.C. 7114(b)(4) are met (and we have not sought review of that holding although we believe it to be erroneous), there will be no obstacle to enforcement of the Authority's orders on remand. Thus, we will agree with the Authority on remand that the Eighth Circuit should enforce those orders in full.

CONCLUSION

The petition for a writ of certiorari should be held pending finalization of the routine use recently published for comment by the Department of Agriculture and pending publication and finalization of a similar routine use by the Department of Defense. The petition for a writ of certiorari should then be granted, the judgment of the court of appeals vacated, and the case remanded for further consideration in light of the new routine uses.[12]

Respectfully submitted.

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OCTOBER 1988

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[12] If the Court chooses not to take that course of action, then the judgment of the court of appeals should be summarily reversed on the ground that, even apart from the new routine uses, the "opt-out" requirement that the court of appeals devised has no basis in law.

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No. 88-349

In the Supreme Court of the United States

OCTOBER TERM, 1988

FEDERAL LABOR RELATIONS AUTHORITY, PETITIONER

v.

UNITED STATES DEPARTMENT OF AGRICULTURE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONER

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PETITIONER'S REPLY MEMORANDUM

The United States Department of Agriculture, Farmers Home Administration Finance Office, St. Louis, Missouri, and the Defense Mapping Agency Aerospace Center, St. Louis, Missouri, in their brief responding to the Federal Labor Relations Authority's certiorari petition, agree with the Authority that the court below erred in allowing individual bargaining unit employees the option of directing their federal agency employers to withhold release of the employees' names and home addresses to the employees' exclusive bargaining representatives (Resp. Br. 17-18). The federal agency respondents also indicate that they are in the process of issuing "routine uses" under provisions of the Privacy Act, 5 U.S.C. 552a(a)(7) and (e)(4)(D), permitting disclosure to labor organizations of home addresses or designated mailing addresses of unit employees (Resp. Br. 20-21). The agency respondents indicate that upon final issuance of these routine uses the Privacy Act will

be eliminated as a bar to disclosure of this data to exclusive representatives in these agencies under 5 U.S.C. 552a(b)(3) (Resp. Br. 21). Accordingly, the Eighth Circuit's analysis under 5 U.S.C. 552a(b)(2) of whether disclosure of the data is required under the Freedom of Information Act (FOIA), 5 U.S.C. 552 (1982 & Supp. IV), which analysis includes the Eighth Circuit's conclusion as to individual employees' "opt out" rights, would become "irrelevant" (Resp. Br. 21). In conclusion, the agency respondents suggest that the Court hold the Authority's certiorari petition pending finalization of the two routine uses; then grant the Authority's petition; vacate the judgment of the lower court; and remand the case to the lower court for further consideration in light of the new routine uses.

The Authority does not oppose the agency respondents' suggestion that the Authority's certiorari petition be held pending finalization of the routine uses; and that upon their finalization the certiorari petition be granted and the judgment of the Eighth Circuit be vacated.[1] However, the Authority does not concur that the terms

[1] The Authority's concurrence in these aspects of the agencies' suggestion for disposition of this case does not constitute a stipulation that issuance of the routine uses contemplated by the agencies is a necessary requisite to disclosure of employee names and home addresses under Section 7114(b)(4) of the Federal Service Labor-Management Relations Statute (Statute), 5 U.S.C. 7114(b)(4). The Authority held in its decisions at issue in this case that an already-existing routine use promulgated by the Office of Personnel Management, generally dealing with data disclosure to exclusive representatives, in itself eliminates the Privacy Act as a barrier to disclosure of employee names and home addresses (Authority Pet. 45a-46a). The Authority continues to adhere to this position, as well as its holding that disclosure of the subject data is required under the FOIA (Authority Pet. 43a-45a).

of the remand to the lower court should allow that court to reconsider the matter in light of the new routine uses. Rather, in the Authority's view the remand to the lower court should be with the direction that the court issue a judgment enforcing the Authority's orders in this case in full.[2]

This Court has issued the kind of summary reconsideration order suggested here by the respondent agencies when there is doubt whether the intervening event giving rise to the suggestion for reconsideration by the lower court would alter the lower court's ruling. See, *e.g., Bureau of Economic Analysis* v. *Long,* 454 U.S. 934 (1981) (remand for reconsideration ordered where intervening enactment of a statute may affect lower court's ruling issued prior to enactment of the law); *Henry* v. *City of Rock Hill,* 376 U.S. 776, 777 (1964) (remand for reconsideration ordered where intervening precedent of this Court may be sufficiently analogous to case under review by the Court to warrant reexamination of the case by lower court).

In the instant case, by contrast, the parties are unanimous in their view that the employee option aspect of the lower court's ruling at issue in the instant case is in error; and that issuance of the routine uses con-

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[2] The respondent agencies also suggest (Resp. Br. 22 n.12) that if the Court declines to grant the Authority's certiorari petition, vacate the lower court's judgment, and remand for further consideration in light of the new routine uses, the Court should in any event summarily reverse the Eighth Circuit's "opt out" requirement as unsupported by law. The Authority does not oppose this alternative suggestion, based on the understanding that summary reversal on this ground would necessarily entail a direction to the lower court to issue a judgment enforcing the Authority's orders in full.

templated by the respondent agencies must result in a judgment of enforcement in full by the Eighth Circuit. In this connection, the respondent agencies state that upon final issuance of the routine uses, "there will be no obstacle to enforcement of the Authority's orders on remand. Thus, we will agree with the Authority on remand that the Eighth Circuit should enforce those orders in full" (Resp. Br. 22). In such circumstances it would appear more appropriate for this Court to direct the lower court on remand to enter a judgment of enforcement in full, rather than allow that court to reconsider the matter. *Rinaldi* v. *United States,* 434 U.S. 22 (1977) (government's admitting error of lower court ruling warrants this Court vacating lower court judgment with direction to issue appropriate judgment). In short, since it appears clear to all parties that there is nothing for the lower court to reconsider on remand upon issuance of the new routine uses, a remand allowing for reconsideration by that court is inappropriate.[3]

Respectfully submitted,

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[3] Charles Fried, Solicitor General, authorized the filing of this Memorandum.

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